Product Liability: A U.S. View

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Content for this book has been taken in part from class lectures created by the author, and that have been used in her courses at Eastern Michigan University, in Ypsilanti, Michigan, U.S.A. Some content is also based on the author's experience as a product liability trial lawyer.

Any errors or omissions are the sole responsibility of the author.

Contents

Dedications

This book is dedicated to my mother who taught me the deep value of writing and enthusiastically supported this project. She died before this book's completion and now inspires me from beyond the stars.

This book is also dedicated to Paul Hulsey, a profound inspiration, my mentor and true friend, who helped me to understand how to make product liability law come alive in the courtroom for the jury.

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A Special Acknowledgement

The author would be remiss if she did not thank her copy editor, Ellen Wheeler, J.D., for her wonderful work on this book.

1 What is Product Liability Law in the U.S.?

Objectives

After completing this chapter, the student should be able to:

- Discuss and define what is meant by **product liability law;**
- Explain the historical development of product liability law in the U.S.;
- Discuss and define the doctrines of **caveat emptor** and **privity;**
- Explain why the courts eventually abandoned the contract rule of privity; and
- Discuss the issue before the court in the *MacPherson v. Buick Motor Car Co.* case and the impact this court decision had on product liability law.

1.1 An Introduction and Clarifying Definitions

The study of product liability law in the United States gives the student an exciting insight into how laws must be developed and changed if a legal system is going to successfully protect its citizens. As inventions and products, from refrigerators to transistor radios to sophisticated computers to cell phones, rapidly became a part of the everyday life in the United States, the legal system was challenged to keep pace as new liability questions reached the courts involving these new products. As you begin your study of product liability law, it is important for you to start with an historical perspective to appreciate this area of the law. It is also important for you to recall certain legal concepts and definitions that you may have studied in the past and to understand some new ones. Let us now turn to the explanations of these definitions.

Product liability law, also called *products* liability law, is a body of **civil tort law** within the legal system. **A tort** is defined as a civil wrong, not involving a contract. A civil wrong is addressed by a distinctly differently process in the legal system than a crime. **Criminal law** was developed to protect society, as a whole, from miscreant citizens who commit crimes. A state or locality prosecutes criminal behavior to protect its citizens. In comparison, **civil law** means the legal process that developed over time to resolve disputes among and between individual citizens. Corporations are given *citizen* status in the civil law arena, which is why we read about civil lawsuits brought against corporations, such as the automobile, drug and other product manufacturers. There is no punishment by imprisonment in the civil law system as there is in the criminal system. The goal of civil tort law it so make a citizen whole, as much as is reasonably possible, through the award of money damages, for an injury. The person, persons or corporation that brings or files a civil lawsuit is called the **plaintiff**. The person (or corporation) who defends the lawsuit is called the **defendant.** To begin a civil lawsuit, the plaintiff files a document with the appropriate court that is called a **complaint.** The complaint succinctly states or outlines the plaintiff's facts and the legal basis or theories about the defect that caused the plaintiff's injury.

The starting point for any lawsuit is with the definition of product liability, which has been developed over time. The tort of **product liability** is defined by legal scholar**s** as: "A manufacturer's or seller's liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product."[1]

There is no universal, national product liability law in the United States. As each of the states confronted product liability lawsuits, their respective courts and legislatures crafted new laws, many of which were taken from existing laws in other states. Despite differences among the laws of the states, there are certain general elements that must be present to substantiate the filing of a product liability lawsuit in most jurisdictions in the U.S. It is these general characteristics that we will study. First and foremost there must always be a **defect** in a product. Generally, civil wrongs (torts) often focus on the conduct of the individuals or parties involved. Product liability cases shift the focus, from the conduct of individuals between themselves, to the nature of the product and conduct surrounding the design, production and sale of that product.

Once a product defect is established, there are **three primary** overarching **theories** used in product liability lawsuits, which we will study. They are: (1) **negligence** (2) **breach of warranty** and (3) **strict liability**. We will study each of these theories in more detail. At this point, a general legal definition of negligence will be helpful as you continue to read this chapter. **Negligence** is defined as: A failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of actions, but can also consist of omissions when there is some duty to act (e.g., a duty to help victims of one's previous conduct).

These legal theories are created and developed by **two legal sources of U.S. product liability law**: (1) case law (the common law), which is the **precedent** (the decision in a previously decided case) set through court decisions and (2) **statutes**, which are the laws written by a state legislature or the U.S. Congress and are interpreted by the state and federal courts. When researching a product liability case, the careful researcher must be certain to check both the individual state's case law and statutes, and federal statutes and court decisions, to determine how a particular jurisdiction either applies or does not recognize the three theories above.

With the above definitions and concepts in mind, let us examine, in more detail, the history of the body of civil tort law known as product liability. As we traverse the history of product liability law to modern day, the goal is to provide you, the student of the law, with a basic foundation and working knowledge of concepts, terminology and legal rules that will enable you to understand U.S. products liability law as it continues to develop and unfold. This book is about the basics of product liability law in the United States.

1.2 Product Liability Law: A Brief History

The development of all common law tort rules in the U.S, has been analogized to the…"twisting and sometimes misdirected course of a run-away calf." The law of torts in product liability cases has followed this same twisted course. "No one can seriously argue that the law of Products Liability in any jurisdiction in the United States has evolved in a straight line."[2] One reason for this complicated history is that product liability law is unique because it evolved from two separate bodies of law, those of negligence and contract. As product liability case law developed, the contract law theories were overruled by the courts and disappeared from consumers' lawsuits against product manufacturers. As inventions and products were introduced to citizens, legal theories based on negligence were expanded by the courts and state legislatures. The purpose of this expansion was to establish a balance and a fairness for those injured by defects in products. As product production grew exponentially in the U.S., courts struggled to keep up with new legal theories based on this product explosion being brought before them. And modern product liability law took shape.

Very early in U.S. legal history, product liability law adopted the tenets of the English law that governed the transactions between a buyer and seller of goods. As noted above, the first product liability lawsuits involved legal tenets from both contract law and the law of negligence. If a buyer was injured when using a seller's product, the purchaser could bring a lawsuit against the seller based upon **negligence.** The doctrine of **caveat emptor**, or *let the buyer beware*, also controlled the early contracts for the sale of products. In other words, the risk of defects in a product, even if the defect was hidden, was generally considered the buyer's problem. Legal recourse was not an option for a *bad deal*. For example, in a simple case, if a seller sold a team of horses to a farmer, the farmer-buyer was charged, under then existing legal principles, with knowing exactly what she was purchasing. If the horses were unable to perform the farming tasks, the doctrine of caveat emptor applied and the farmer-purchaser had no legal recourse against the horse seller. She lost what she had paid (or traded) for the poorly performing horses.

As the needs of citizens for legal protection grew, the lawmakers struggled with how to modernize the laws and eliminate certain legal doctrines, which were fostering unfair results. One of the major changes to note here was the elimination of a key principle of contract law called privity. **Privity** meant that a lawsuit against a product manufacturer for a defect could only be brought by the actual buyer and against the actual seller – the parties who sealed the sale with a handshake. For example, if a plaintiff was injured by a defect in an automobile, the plaintiff could only sue the car seller for his injuries. Consider how difficult it would be to prevail against the seller, the only person with whom he was in privity of contract, but who likely had absolutely nothing to do with the manufacture of the defective car! The injured plaintiff could not sue the manufacturer of the automobile, the real person responsible if there was a provable defect, because the buyer had no direct contact with the manufacturer. The courts realized the unfairness of this situation. The law was changed by the New York state court decision,[3] *MacPherson v. Buick Motor Car Co*., 11 NE 1050 (N.Y. 1916), which eliminated the requirement of privity for a purchaser to bring a products liability lawsuit.

Over time, this New York decision, which we will review below, was adopted as the legal rule by all of the states.

1.2.1 The Impact of the Industrial Revolution

When the Industrial Revolution roared into the United States, at the beginning of the Nineteenth Century, manufacturing was modernizing and products were becoming more sophisticated and complicated. More and more manufacturers were using component parts, from other manufacturers, that they purchased and used to create and market their ultimate product. The marketplaces expanded, too. Consumers moved from their own back yards and ventured to buy goods at places such as stores and car dealerships. The courts had new and more complicated cases before them that involved buyers and sellers of these new products. A legal dilemma developed. (Remember here that the early lawsuits were based on both negligence and contract law.) If a purchaser was injured by a defective product and wanted to bring a lawsuit based on negligence, the rules of contract law imposed the doctrine of privity on the lawsuit. This meant that an injured consumer-plaintiff could only bring a negligence lawsuit against the seller from whom the buyer had directly purchased the product. If the seller was a hardware store or car dealership, the injured buyer was left without a successful recourse because the store or dealership, the actual seller, had not been negligent. And, since the buyer had no dealings with (was not in privity with) the manufacturer, the purchaser was legally prohibited from bringing a lawsuit against the negligent manufacturer.

As part of their legal analysis in these new disputes before them, courts began to weigh the knowledge held by each party in the transaction involving a product. The justices began to question whether a more knowledgeable party should, in fairness, be held to a higher responsibility in the transaction. After all, how could a farmer bring equal knowledge about the capabilities of a new machine to the transaction? The knowledge of whether the more modern, and presumably more expensive machine, could perform the harvest jobs better than teams of horses, lay, in fairness, with the manufacturer. The farmer was forced to rely upon the seller and the manufacturer to know if the mechanized plow would do the harvest jobs. In these early days, the seller presumably had much more knowledge available about the new product being sold. This fact was not lost on the courts. The legal decisions began to contain analysis that weighed the respective knowledge of the seller and the purchaser to determine how to resolve disputes (lawsuits), involving new machinery that did not do the proclaimed job.

Solving the legal dilemma described above provides a good example of how the country's legal system must adapt itself to the changing needs of the society, which its laws control. As more and more products were available in the marketplace for citizens to purchase, either for personal or commercial use, the legal system, through its laws and court decisions, was forced to re-examine where responsibility should lie if anything malfunctioned within a product purchased by an individual (or a corporation).

The doctrine of caveat emptor was slowly diminishing, too, in the developing product liability law. By the end of the 1880's, courts in the United States began to hold the direct sellers responsible for *hidden defects* in the products that they sold. Courts reasoned that if a buyer paid fair value for a product, the sale raised an implied warranty against hidden defects. It is interesting to note that the seeds of today's consumer protection laws were beginning to be sown by the legal system so long ago.

1.2.2 The Elimination of Privity

No longer was the purchaser in actual privity with those responsible for all of the parts that could fail in a given product. Thus, the courts realized, negligence cases involving products sold to consumers must change. The principles of contract law no longer worked and had to be replaced, although some vestiges of contract law remain today as we will see later in the discussion about warranty claims. The courts, in reviewing lawsuits between sellers and buyers, also became increasingly uncomfortable with the rule of caveat emptor. Many business transactions were no longer exchanges of simple goods, such as livestock, farm harvests and land parcels, for money or trade. Instead, products for purchase became more complicated and purchasers were forced to rely on the sellers to deliver the product that the seller advertised. No longer could a farmer use her knowledge of horses to examine and then decide to purchase a hearty team to plow the fields. Instead, the "modern" farmer was facing complicated questions about engines and cotton gins to continue to keep up. The legal system, faced with drastically changing needs from the society it served, began to ask which party had more knowledge of the product involved in the sale.

In 1916, the U.S. Courts saw the first major product liability case involving the sale of an automobile, in *MacPherson v. Buick Motor Co.* The decision in this case helped to sculpt the modern law of product liability. There were two major legal results from this decision: (1) the need for privity was eliminated between a buyer and a seller of a defective product that caused injuries and (2) a plaintiff was allowed to sue the manufacturer, Buick Motor Co, even though the defect was in a component part, the wheel, which was installed, but not manufactured, by the defendant Buick Motor Co. The actual wheel manufacturer was not a defendant in the case. As this case demonstrates, the courts began to look beyond the isolated transaction between the immediate buyer and seller, and to assess responsibility in some circumstances against those who manufactured the product, notwithstanding the fact that the manufacturer did not make the particular defective part. Let us now examine the historic *MacPherson* case, written by Justice Benjamin Cardozo, an eminent U.S. jurist who later became a U.S. Supreme Court justice.

Figure 1.1 – Old U.S. automobile with wooden-spoked wheels.

Figure 1.2 – Wooden spokes on an old U.S. automobile wheel.

Source for both figures: Can Stock Photo, Inc.

The Court Speaks

MacPherson v. Buick Motor Co., 217 N.Y. 382; 11 N.E. 1050 (N.Y. 1916)[4]

Facts:

Defendant Buick Motor Company sold a car to a retail car dealer. The car dealer resold the automobile to the plaintiff. While plaintiff was in the car, which was being prudently operated at a speed of only eight miles per hour, the car collapsed. The collapse was due to the fact that one of the wooden wheels was made of defective wood and crumbled into fragments and plaintiff was severely injured. Plaintiff sued the car manufacturer for negligence and not the car dealer. The wheel was made by The Imperial Wheel Company of Flint, Michigan, which furnished the defendant with eighty thousand wheels, none of which had proved to be made of defective wood prior to the accident in the present case. There was no allegation or proof of any actual knowledge of the defect on the part of the defendant or any suggestion that any element of fraud, deceit or misrepresentation entered into the sale.

Discussion:

The eminent jurist, Justice Benjamin R. Cardozo, framed the issue in his decision in *MacPherson* as: "The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser."[5]

The theory on which the case was presented to the jury was that, although an automobile is not an inherently dangerous vehicle, can it become one if equipped with a weak wheel and that if the motor car in question, when it was put upon the market was in itself inherently dangerous by reason of its being equipped with a weak wheel, the defendant was chargeable with knowledge of the defect so far as it may have been discovered by a reasonable inspection and the application of reasonable tests. The liability claimed was not limited to the original purchaser but extended to the plaintiff who was not a party to the original contract of sale.

Despite the fact that the defective wheel was not made by the defendant, Justice Cardozo noted that there was evidence that the defects in the wheel could have been discovered by reasonable inspection and that inspection was omitted. There was no claim of fraud. After framing the issue as we saw above, the Justice wrote: "There must be knowledge of a danger, not merely possible, but probable," for liability to attach.[6] Justice Cardozo explained how a manufacturer, who could foresee potential danger in the use of the product by those other than the immediate purchaser, could be held liable for those injuries even if there was no direct contract between the parties.

With words that would change the landscape, by broadening the definition of those who could be responsible for injures from a product, Justice Cardozo also wrote: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made…The manufacturer of this thing of danger is under a duty to make it carefully. If not, the manufacturer may find itself liable to a person injured beyond the immediate seller."[7] By 1982, this *MacPherson Rule*, as it came to be known, was incorporated in some form into states' product liability laws in each of the United States.

Questions:

1. What were the key facts in the *MacPherson* case?
2. What were the questions Justice Cardozo analyzed in reaching his decision in the case?
3. Why did Justice Cardozo decide to expand a manufacturer's responsibility for injuries suffered if a product failed?
4. What is meant by the term **privity**?
5. Why did Justice Cardozo eliminate the need for privity in this case?

The result of the *MacPherson* decision began an influential expansion of the laws that defined those who could be sued in product liability case. With privity no longer a limitation, the law began to assess liability for injuries against those in the *production* line of a product. As the number of persons who could be held legally responsible for injuries expanded, the number of lawsuits filed increased greatly. Today, for example, in the State of Michigan, those *involved in the production of a product* who can be potential defendants, have been defined by statute (Michigan Compiled Laws [MCL]) to mean those involved in *the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling.*[8] The student can see how the number of potential defendants in a product liability lawsuit is greatly increased by this definition.

Prior to the *MacPherson* case, justices were beginning to struggle in their decisions, to meet changing societal needs as newer products were introduced. Prior to this automobile case, and absent fraud, courts were primarily awarding damages against manufacturers, to third-party consumers, of only **inherently dangerous** products, such as poison or dynamite. The *MacPherson* case expanded the duty of manufacturers even further by imposing liability on manufacturers whose products could become dangerous by improper manufacturing. Justice Cardozo noted in *MacPherson*, that a newer trend in judicial thought was developing that examined the liability of manufacturers that was not limited to things imminently dangerous to life. "A scaffold (citation omitted) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (citation omitted) may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction."[9] The new rule developing in both the United States and England, was placing legal responsibility, a duty, on a manufacturer to a consumer, regardless of whether or not the parties had a contract between them.

By 1982, the *MacPherson Rule* was incorporated, in some form, into all of the states' product liability laws based on negligence.

1.2.3 The Role of the Treatises called the Restatements of the Law

In the U.S. Legal System, there are legal treatises that endeavor to summarize or *restate* the common law in a particular area. These treatises are called **Restatements of the Law.** The Restatements are written by members of the American Law Institute (ALI), a nonprofit legal organization composed of 4,000 highly respected judges, lawyers and law professors. These legal scholars have addressed the tort topic of *product liability* in two treatises that will be referred to during our studies. They are the *Restatement of Torts (Second), §402 A*,[10] published in 1965 and the *Restatement of Torts (Third): Products Liability*, published in 1998. Although the Restatements are secondary sources, they are highly regarded and have influenced the development of product liability statutes and the courts' analysis of product liability laws in the U.S. (Remember that there are two categories of sources in legal research**: primary sources** and **secondary sources**. A **primary source** is the actual law written in the court decisions and statutes. A **secondary source** is a treatise or writing that summarizes and analyzes this *primary law* (case law and statutes) to help the legal researcher's understanding.)

During the 33 years between the publication of the Second and Third Restatements, there was a sea change of development and progression in the area of product liability law. Part of this complicated trail, as the contemporary legal scholar Geoffrey C. Hazard, Jr. explains in his Forward to the *Restatement of Law Torts (Third): Products Liability,* is that the subject of products liability has in recent years become *"political" in that it involves issues of distributive justice and has attracted the attention of vocal and aggressive partisans in legislative forums and election campaigns…*"[11] Later in our studies, we will examine the legal phenomenon known as *mass tort litigation*. This discussion, in Chapter Seven, will give you a good example of what Hazard means when he says that modern day product liability law has become quite political.

Suffice it to say here that all but the five states have adopted the definitions and rules written about product liability law in the Second Restatement of Torts. This means that there is some overall consistency to the law of product liability in the U.S. and this is what we will study. However, the student will want to remember that this consistency took over 30 years of law changes and court interpretations to develop the complicated product liability law trail. A goal of the Third Restatement was to untangle and modernize the approach to this area of the law. This attempt has been met with much criticism. Only the next 30 years of the development of product liability law in the U.S. will tell us if the Third Restatement met its goal.[12]

1.3 Summary

In this chapter you learned a brief history of how the courts in the United States developed the law of product liability, the law that holds manufacturers liable for injuries caused by their defective products. You learned that early U.S. product liability lawsuits were based upon both negligence and contract law. However, as time passed the contract doctrines of *caveat emptor* and *privity* were all but abolished in favor of the negligence theory. You learned how the courts changed and sculpted product liability law to meet the needs of a society that was rapidly changing due to the many products introduced to society, beginning with the Industrial Revolution. You learned that these needs included protecting third-party users, the actual consumers of products, and how the need for privity of contract was abolished in product liability lawsuits by Justice Cardozo's decision in the landmark *MacPherson* case.

1.4 Key Terms

A primary source of the law
A secondary source of the law
Caveat emptor
Civil law
Contract law
Negligence
Privity
Product liability
Justice Cardozo
A Restatement of the Law
The *MacPherson* Rule
Tort

1.5 Chapter Discussion Questions

1. What is the difference between civil law and criminal law?
2. What is the difference between a tort and a contract?
3. Define *privity.*
4. What is meant by the term *caveat emptor?*
5. Define the term *product liability*.

6. What role did the Industrial Revolution play in the development of U.S. product liability law?
7. What was the name of the case that eliminated privity in products liability law?
8. Why did Justice Cardozo eliminate the need for privity in a product liability lawsuit?

1.6 Test Your Learning

1. What is a tort?
   a) A delicious cake
   b) A civil wrong for which monetary damages are awarded.
   c) A crime punishable by a jail term.
   d) None of the above

2. What is meant by the term *privity*?
   a) A term in contract law that means the parties to a contract have a legal relationship that imposes specific duties on the parties.
   b) A legal concept that was eliminated in U.S. product liability law by the Court's decision the *MacPherson v. Buick* case.
   c) The relationship between a buyer and seller that was required to sue for injuries from a product before Justice Cardozo wrote the decision in the *MacPherson v. Buick* case.
   d) None of the above.
   e) All of the above.

3. What is meant by the term *product liability*?
   a) A manufacturer or seller's liability for any damages or injuries suffered by a buyer, user or bystander as a result of a defective product.
   b) A seller's liability for any damages or injuries suffered by a buyer, user or bystander as a result of a defective product.
   c) A seller or manufacturer's liability for any damages or injuries suffered by a buyer, in privity with the seller or manufacturer, as a result of a defective product.
   d) The liability for damages that is available only between the buyer and seller of a product.

4. What is meant by the doctrine of *caveat emptor*?
   a) The seller is responsible for any defects in the product being sold.
   b) The buyer must beware of any defects in the product purchased.
   c) A rule that allows an emperor to reign.
   d) None of the above.

5. In the *MacPherson* case, who made the defective wheel on the automobile?
   a) The defendant Buick Motor Company
   b) The plaintiff
   c) A third party, the Imperial Wheel Company
   d) None of the above.

6. What two bodies of law formed the basis for U.S. product liability law?
   a) Contract law and the law of negligence
   b) Precedent and statutes
   c) Statutes and case law
   d) The Industrial Revolution.

7. What is meant by the term *civil law*?
   a) The law that imprisons people for committing a crime
   b) The law that settles disputes between individuals
   c) The law that states that people have to be nice to each other
   d) None of the above.

8. What is meant by the term *complaint* in civil law?
   a) The document filed by the plaintiff in a court to start a lawsuit
   b) The document that succinctly states the plaintiff's facts and theories of liability
   c) A person who is always said
   d) A and B
   e) A and C

9. What was one impact of the Industrial Revolution on product liability law?
   a) There were more automobiles available for purchase
   b) Courts had novel and more complicated cases to decide involving new products
   c) Manufacturers were helping build the economy
   d) None of the above.

10. What are the two sources of product liability law?
   a) Precedent and a complaint
   b) The Restatements and statutes
   c) Case law and statutes
   d) The *MacPherson* case and Justice Cardozo.

Test Your Learning Answers are found in Appendix A.

2 Legal Theories of Recovery in Product Liability: Negligence

In the first chapter, we saw how the courts began to develop the law of product liability in the United States to protect injured consumers. We will now turn to the four specific legal theories of: (1) **negligence,** (2) **breach of warranty,** (3) **strict liability,** and (4) **misrepresentation**. Injured consumers base lawsuits to recover for their injuries on one or a combination of these theories when filing a complaint to start the process in court.

Objectives

After completing this chapter, the student should be able to define and discuss, in general, the following legal theories for recovery in a product liability lawsuit:

- Negligence;
- Strict liability; Breach of warranty; and
- Misrepresentation.

Introduction

Product liability lawsuits can be brought against any entity in the chain of a product's manufacture and distribution. This means that a manufacturer, seller, and/or supplier, either alone or together, can be held **liable** (legally responsible) to an injured person for his or her injuries. For clarity, our discussion of the legal theories in product liability cases in the United States, will primarily be focused on the conduct of the product manufacturer. However, as a student of product liability law, you should be aware that the same theories are also used to hold designers, sellers and distributors of unsafe products liable for injuries. In a given lawsuit, plaintiffs may sue the manufacturer, the seller and/or the distributor of a product.

We will concentrate on the key court decisions that shaped and defined the principles of product liability law. These court decisions were then adopted by the courts of many other states as the law of product liability was formed across the United States. As you study the law, you should be aware that any thorough study of product liability law in the United States requires a review of the law of each individual state because state laws differ. Each of the 50 states will have both case law precedent and statutes that contain the legal theories for filing a lawsuit based upon product liability within its boundaries. It is important to note, too, that some states do not recognize all four of the theories listed above.

2.1 The Negligence Theory

In Chapter One, we learned that the original product liability lawsuits were based on combined rules of contract and negligence law, making negligence the oldest tort theory that allows a manufacturer to be held liable for injuries to a person due to a defective product. Consequently, the negligence theory has a very large presence in product liability case law and is the principal cause of action in product liability lawsuits in the U.S.[13] The term **negligence** is defined as: "The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[14]

The primary purpose of negligence law is to protect others from *unreasonable* risks of harm, which are foreseeable and therefore preventable. For example, in the case *Grimshaw v. Ford Motor Co*., 119 Cal. App. 3d 757,174 Cal. Rptr. 348 (1981) (*The Ford Pinto case*)[15], which we will review in depth later in this chapter, the accident in which the Ford Pinto caught fire could have been prevented with a very inexpensive design change before the car was put on the market. In its verdict, the jury told defendant Ford Motor Co. that it acted unreasonably in failing to correct the defect. It is important to note here that in the law there is a fiction used that describes a character known as the *reasonable person*. You will encounter abundant analysis by the courts of what kind of conduct is reasonable or unreasonable, and you will read many court decisions where the judges discuss the reasonableness or unreasonableness of a defendant's conduct as a court determines whether or not a defendant should be held liable. A person's (or corporation's) conduct is assessed against that of this pivotal *reasonable person*. (Remember that in the law a corporation is treated as a person for purposes of analyzing the corporation's actions.) If the conduct conforms with what the fictional reasonable person would do under similar circumstances, then the court will likely find that the defendant's conduct was not negligent. On the other hand, if a design or manufacturing change costs little in comparison to the potential danger to the consumer, the court may determine that a defendant's conduct is unreasonable if the change is not made. Under the negligence theory, the failure to conform a person's conduct to that of this hypothetical *reasonable person* means that legal liability will result if that failure causes injury to another person or to property.

When the courts talk about reasonable care in their decisions, their analysis tries to balance the actions of the defendant with those of the fictional reasonable designer, distributor or manufacturer of a product. The question is usually: What would be the cost to make a product safer? Would it be reasonable to spend a few more manufacturing dollars on the product to prevent great harm to the consumer? For example, let's consider a manufacturer of step ladders. The manufacturer knows that it could guard against the risk of a ladder step collapsing under the weight of an average 165-pound worker by using a heavier bolt than the one originally designed for the ladder. The heavier bolt would cost just a few pennies more. If the manufacturer chooses not to use the heavier bolt for its ladders, a court may find that such a decision by the manufacturer was unreasonable because only a small amount of care and expense was needed to avoid a huge risk of a worker's injuries in a fall. After calculating the large risk against the small cost for safety, a court would likely find the manufacturer liable for the worker's injuries.

2.1.1 The Four Elements of Negligence

We have learned that the negligence theory is important to product liability law.
There are four key elements to any tort lawsuit that is based on a negligence theory:

1. A legal **duty** owed to the plaintiff by the defendant;
2. A **breach** of this duty by the defendant;
3. The **causation** of damages to the plaintiff because of the breach; and
4. Actual **damages** suffered by the plaintiff.

There is an important rule to remember here: If any one of the four elements – duty, breach, causation or damages – is missing from the facts of the plaintiff's case, the plaintiff cannot prevail in a lawsuit based upon the negligence. In the specific context of a product liability lawsuit, the elements of the negligence theory often appear as follows in the written complaint filed with the court:

1. The defendant product manufacturer (and/or product seller and/or product supplier) ***owed a duty*** to the plaintiff to make, sell or supply a ***product that was not defective;***
2. The defendant manufacturer (seller, supplier) ***breached its duty*** by manufacturing (selling, supplying) ***a defective product;***
3. The manufacturer's (seller's, supplier's) ***breach was a cause*** of the plaintiff's injury; and
4. The *plaintiff suffered actual damages* that are recoverable as a result of this breach.

2.1.2 Duty

The first question that must be asked in a prospective product liability lawsuit based on the negligence theory is: **Does the defendant-manufacturer (seller or distributor) owe a duty to the plaintiff-purchaser?** Remember that if there is no duty owed to the plaintiff, then there cannot be negligence. **The rule is that a manufacturer owes a** duty **to the plaintiff to refrain from selling products that contain an unreasonable risk of harm.** Stated simply, the manufacturer owes the plaintiff a duty to use *reasonable* care in making a product. The duty to use reasonable care does not mean *perfect* care. In most states, this duty is limited to persons foreseeably placed at risk. The duty does not extend to every single person. The duty is to avoid foreseeable risks, which are reasonably anticipated risks; not all risks are foreseeable. "It is important to remember that the duty in the negligence theory is one of reasonableness and not perfection."[16]

How do the courts determine if a duty exists? The courts consider a broad range of factors, such as fundamental fairness, justice and social policy, to determine whether or not the manufacturer (seller, distributor) of a product has a duty to the consumer. The courts examine the relationship, or respective status, between the buyer and seller of the product to determine which party may have the most knowledge of the product. For example, some courts might rule that an electrician purchasing light fixtures from a lighting manufacturer has sufficient knowledge, if not equal to that of the manufacturer, about how a light fixture works to lessen the duty owed by the manufacturer. The electrician is smarter than most consumers because of her education, experience and training. If the electrician chose to connect a regular light fixture that was not waterproof into an underwater circuit and was injured in the process, the courts might decide that the electrician's actions were unreasonable because the electrician should know that water and electricity are a bad combination. The court might find the manufacturer did not owe a duty to warn of harm to the electrician because the electrician had superior knowledge and acted unreasonably when compared to reasonable conduct of an electrician working in water. Thus, the manufacturer would not be held liable if the electrician sued the manufacturer for injuries.

Consider if the facts in the above example were changed and the purchaser of the light fixture was not an electrician. Rather, a lay person went to the manufacturer and told the manufacturer that she needed a bigger light fixture to plug into her outside socket to light her pond. Given this change in the level of knowledge between the manufacturer and the purchaser, some courts might hold the manufacturer liable for injuries because the manufacturer had a duty to warn this ordinary customer about the dangers surrounding the installation of electric fixtures around water. It would be reasonable for a manufacturer to give this warning because of its duty to the ordinary consumer.

Some courts have ruled that a manufacturer does not have a duty to provide certain safety features as standard equipment if those features are sold as options or to warn of dangers that are considered *open and obvious*. For example, consider whether or not a duty would exist for the manufacturer of a high-powered, electric wood saw to paint a large bold sign on the saw stating, *Keep hands away from blades when saw is turned on.*

Figure 2.1 A circular saw

Would not a reasonable person know to keep her hands away from a whirling, razor-edged blade? On the other hand, a manufacturer might be found to have created an unreasonable risk of harm, and breached its duty to a consumer, if a guard was not placed around the whirring blade to help to prevent a user from placing hands too close to the saw when it is on.

Let us now turn to the element of *breach*.

2.1.3 Breach of Duty

If the plaintiff (the consumer or user of a product) can establish a duty owed to her from the manufacturer, she must next establish that the manufacturer-defendant **breached** its duty. **A *breach of duty* occurs when the manufacturer fails to act with reasonable care under the circumstances.** Thus, to avoid being found negligent, a manufacturer must use reasonable care in all aspects of its manufacturing process for a product. Not surprisingly, based upon what we have learned so far, courts describe this standard of care as that of a *reasonable manufacturer*.

A reasonable manufacturer is held to a level of expertise in its particular manufacturing field. For example, our lighting fixture manufacturer would be held to the reasonable conduct of light fixture manufacturers in the same circumstances. The manufacturer's conduct is fairly measured against that of a reasonable manufacturer who is an expert in manufacturing that particular type of product. "A manufacturer is charged with the duty of design, manufacture, and marketing commensurate with an expert's awareness of the particular product's forseeable environments of use and special dangers within those environments."[17] With this concept in mind, think again about how the light fixture manufacturer, in our example above, should have told the consumer that the light fixture was dangerous if used around water and could injure her. Because the fixture manufacturer did not provide this warning, the manufacturer would likely be found to have breached its duty to act reasonably. The reasonable manufacturer would have placed a warning on the light fixture that warned the ordinary purchaser about the dangers of mixing water with electricity when using the fixture.

To determine whether a manufacturer acted reasonably or unreasonably (negligently), and thus if the manufacturer breached its duty to the consumer, the courts typically use a risk analysis or the **calculus of risk formula**. This calculus of risk formula is also called the **Hand Formula** because it was written by a highly respected United States judge, Learned Hand, who first applied his theory in a 1949 decision, *United States v. Carroll Towing Co.*,[18] Judge Hand concluded that in order to fairly apportion damages a cost-benefit type of analysis should be applied. You should note that although this case is not about the manufacture of a product, it was quickly adopted by courts in product liability cases to assess breach of duty by analyzing if a manufacturer's conduct was *reasonable.* Was the manufacturer negligent because it did not act reasonably and use sufficient care? If sufficient care was absent, the new formula demonstrated how a manufacturer could be said to have breached its duty and consequently be said to have acted negligently. As we have seen with the development of other rules involving negligence, the *Carroll* case presented unique facts set in a particular time in the country's history that were used by the Court to develop a legal theory that is still used today.

The **Hand Formula** is below, followed by a discussion of the *Carroll* case.

(1) Probability of Injury = P
(2) The injury = L
(3) The burden of precaution = B

If

P x L > B

Then

LIABILITY ATTACHES

There is a breach of duty.

Figure 2.2 The Hand Formula[19]

The Court Speaks

United States v. Carroll Towing Co., Inc., 159 F.2d 169 (2d Cir. 1949)[20]

Figure 2.3 Tug pushing cargo barge

Facts:

This case involved the sinking of a barge, which was filled with flour owned by the United States, in the busy New York Harbor. The harbor was congested with ship traffic not only because it was a major U.S. shipping port but also because World War II was under way. Because the case involved multiple defendants, Judge Hand developed an algebraic formula, aptly called **The Hand Formula** (or, **The Calculus of Negligence Formula**), to fairly apportion liability and, thus, damages among the defendants.[21] After Judge Hand's decision in this *Carroll* case, courts across the U.S. began to use his algebraic formula to decide whether or not a defendant had breached its duty to a plaintiff. (Remember that the et al. abbreviation in the case citation tells us that there was more than one defendant in the case.)

On a stormy day, many barges carrying cargo were moored with shipping lines between two piers in the harbor and extending into the North River. One of these was the *Anna C*, the barge loaded with flour that eventually sank. At one point the *Anna C* was moved by tugboats that were jockeying the barges to allow off-loading of cargo. During this move, the *Anna* C's lines were apparently not sufficiently secured by the dock workers. The movement and re-tying of the lines was supervised by the harbor master and a deck hand employed by the Grace Line. The *Anna C* broke loose along with five other barges that were lashed to her. When the *Anna C* broke loose, there were no crew members on board. As the flotilla of barges was pushed by the tide and wind, the *Anna C* struck a tanker. The propeller of the tanker pierced the *Anna C*'s hull; she careened, dumped her cargo and sank.[22]

Discussion:

Critical to the case was the fact that two vessels with pumping equipment were in the harbor and could have come to the aid of the *Anna C* and probably could have prevented the barge from sinking. However, there was no crew on board the *Anna C* to notify these vessels that there was a leak, so she sank. The sinking and loss of the flour prompted two separate lawsuits between the parties involved in the transporting of the flour to the *Anna C* for shipping and those involved with the events that occurred in the harbor as the cargo was moved about that day. The two cases were consolidated on the various appeals from the trial court before Judge Hand's court.

As Judge Hand sorted through who was liable to whom, and what amount in damages each owed the other, he focused on the fact that the trial court did not assess any liability against defendant Conners Marine Co., the owner of the *Anna C*. Remember that the barge was left without any crew to prevent her sinking. At the time this case was decided, there was no general rule of law imposing liability on a barge owner for the absence of a **bargee** (A bargee is a barge master or deckhand) when a ship breaks from its moorings and causes injuries. In reversing the trial court's decision, it was on this point of a barge owner's responsibility that Judge Hand developed his formula. What made this focus unusual was the fact that the barge owner had suffered the loss of its own barge. However, Judge Hand ruled that this did not automatically exempt the barge owner from liability to the others involved.

Speaking to the owner of the barge, Judge Hand wrote: "However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge."[23] Judge Hand then continued to assess the roles of each party, as reasonable men, to determine whether a breach of the duty of harbor safety applied to the other parties. Judge Hand did this knowing that barges break away in a harbor and more than one party may have breached its duty to act reasonably under the total circumstances. He said: "…there are occasions when every vessel will break away from her moorings, and since, if she does, she becomes a menace." *Id* at p. 173.[24] The case was returned to the trial court for a determination of what, if any, damages were owed by the defendant Conners Marine Co., the owner of the *Anna C,* because no deck hand was on board at the time the boat sank.

Questions:

1. What were the key facts in the *Carroll* case?
2. Why did Judge Hand rule that the defendant Conners Marine Co., whose own barge sank, may owe damages to the other defendants in the case?
3. What is meant by the **Hand or Calculus of Negligence Formula**?
4. When does a **breach of duty** occur?
5. Why did Judge Hand decide that a cost-benefit analysis was appropriate in this case to determine liability among and between the parties to the lawsuit?

Here, you should observe that in *Carroll* case, Judge Hand undertook the central task of the judiciary by examining a given situation before the court and deciding how best to protect society. At what point, the judge is saying, do those with a duty to safely manage the ships in the harbor and prevent injuries breach that duty? The answer to this question was the judge's algebraic formula, charted above. The breach of the duty is subject to three variables, (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; and (3) the burden of adequate precautions.

More than 30 years later, in 1981, Judge Hand's formula was still good law and was applied in a famous court decision that involved Ford Motor Company's Pinto automobile.[25] In the Ford Pinto case, the court was once again called upon to balance the **(P)robability of injury** and **(L)** the **severity of injury** with the **(B)urden of precaution** to determine if Ford had breached its legal duty to the plaintiffs. The Hand algebraic formula, $\mathbf{P \times L > B}$, sustained the test of time and proved to be still vibrant for the court. This case involved the design and manufacture of a new subcompact automobile, which eventually became the Pinto. We will also look at this case when we discuss damages, below.

Figure 2.4 Advertisement of the Ford Pinto

After a terrible accident in which a Pinto caught fire, the driver, Lilly Gray and her passenger, Richard Grimshaw, sued Ford for negligence in producing the Pinto. (Remember our **four elements for a case in negligence** – *duty, breach, causation and damages*.) (Note: Mrs. Gray's heirs settled their case with Ford before the trial, which proceeded with Mr. Grimshaw as plaintiff.) At trial, Ford's own engineers testified and explained to the jury that the company knew of design dangers, and that a fix to insure driver safety would have been cheap.[26] Given the resulting verdict, it is apparent the jurors were moved by the testimony of the company's own engineers. Applying the Hand Formula in their deliberations, the jurors concluded that the **(B)**urden of precaution was little or nothing compared to the **(P)**robability of harm to the plaintiffs. **(L)**iability should attach because of the severity of the plaintiffs' injuries.

The Court Speaks

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981)[27]

Facts:

The Crash

This case involved a fiery crash and devastating injuries that occurred when a Ford Pinto was hit from the rear on a highway and the gas tank exploded. The Grays purchased a new 1972 Pinto, manufactured by Ford in October 1971, in November 1971. The Grays had trouble with the car from the outset. During the first few months of ownership, they had to return the car to the dealer for repairs a number of times. Their problems included excessive gas and oil consumption, down-shifting of the automatic transmission, lack of power and occasional stalling. It was later learned that the stalling and excessive fuel consumption were caused by *a heavy carburetor float*.

On May 28, 1972, Mrs. Gray, with 13-year-old Richard Grimshaw as her passenger, set off on a trip in the Pinto from Anaheim to Barstow, California. The Pinto was six months old and had been driven about 3,000 miles. After a stop for gasoline along the way, Mrs. Gray got back on the freeway and proceeded toward her destination at 60-65 miles per hour. As she approached an off-ramp, traffic was congested so she moved from the outer fast lane to the middle lane of the freeway. Shortly after the lane change, the Pinto unexpectedly and suddenly stalled and coasted to a halt in the middle lane. It was later learned that the carburetor float had become so saturated with gas that it suddenly sank, opening the float chamber and causing the engine to flood and thus stall. A car traveling immediately behind the Pinto was able to swerve to pass it. But the driver of a 1962 Ford Galaxie was unable to avoid colliding with the rear of the Pinto, at a speed between 28 and 37 miles per hour.[28]

At the moment of impact, the Pinto caught fire, and its interior was engulfed in flames. According to expert testimony at trial, the impact had driven the Pinto's gas tank forward and caused it to be punctured by the flange or one of the bolts on the differential housing. As a result, the fuel sprayed from the punctured tank and entered the passenger compartment through gaps that resulted from the separation of the rear wheel well sections from the floor pan.

By the time the Pinto came to a rest after the collision, both occupants had sustained serious burns. When they emerged from the vehicle, their clothing was almost completely burned off. Mrs. Gray died a few days later from congestive heart failure as a result of her burns. Mr. Grimshaw survived because of heroic medical measures, including numerous and extensive surgeries and skin grafts, and he had to undergo additional surgeries for 10 years following the crash.[29]

Discussion:

The Pinto's Design –the ***Probability of Injury (P)***

Trial testimony showed that the design of the Pinto fuel system was one of the decisions dictated by styling of the car and not by engineering. It was the preferred practice in other countries, experienced in the manufacture of subcompacts, to locate the gas tank over the rear axle in subcompacts because a small vehicle has less "crush space" between the rear axle and the bumper than do larger cars. The Pinto styling, however, required that the tank be placed behind the rear axle, leaving only 9 to 10 inches of crush space – far less than any other American automobile or Ford overseas compact car.

The design defects known to Ford about its Pinto were summarized by the court in its appellate decision, which affirmed the judgment against Ford:

In 1968, Ford began designing a new subcompact automobile which ultimately became the Pinto. Mr. Iacocca, a Ford vice-president at the time, conceived the project and was its moving force. Ford's objective was to build a car at or below 2,000 pounds to sell for no more than $2,000.00. Ordinarily, marketing surveys and preliminary engineering studies precede the styling of a new automobile line. But, because the Pinto was a rush project, the styling of this new model, its looks, dictated engineering design to a greater degree than usual.

Among the engineering decisions dictated by styling was the placement of the fuel tank. It was then the preferred practice in Europe and Japan to locate the gas tank over the rear axle in subcompacts because a small vehicle has less "crush space" between the rear axle and the bumper than larger cars. The Pinto's styling, however, required the gas tank to be placed behind the rear axle, leaving only nine or ten inches (229 or 254 mm) of "crush space" should the rear of the car suffer impact.

In addition, the Pinto was designed so that its bumper was little more than a chrome strip, less substantial than the bumper of any other American car produced then or later. The Pinto's rear structure also lacked reinforcing members known as "hat sections" (two longitudinal side members) and horizontal cross-members running between them such as were found in cars of larger unitized construction and in all automobiles produced by Ford's overseas operations. The absence of the reinforcing members rendered the Pinto less crush resistant than other vehicles.

Finally, the differential housing selected for the Pinto had an exposed flange and a line of exposed bolt heads. These protrusions were sufficient to puncture a gas tank driven forward against the differential upon rear impact. This was far less than in any other American automobile or Ford overseas subcompact.

Id. at 775–777

The Crash Tests – ***the Severity of Injury (L)***

Both prototype and production Pintos were crash tested by Ford to determine, among other things, how the fuel system would hold up in a rear-end collision. (Ford was testing in anticipation of new federal regulations for cars manufactured in 1972.) Ford's crash tests on the Pinto revealed that the fuel system as designed could not meet a 20-mile-per-hour crash test standard without significant fuel spillage and, thus, could not meet the impending new standard. A fixed barrier crash test at 21-miles-per hour caused the Pinto's fuel tank to be driven forward and punctured, resulting in fuel leakage in excess of the standard prescribed by the proposed new regulation. In at least one test, spilled fuel entered the driver's compartment through gaps resulting from the separation of the seams joining the rear wheel wells to the floor pan. The Pinto failed tests conducted successfully on other Ford cars.

The Cost to Remedy the Defects – ***The Burden of Precaution (B)***

In assessing the cost to Ford to simply fix the defects before putting the Pinto on the market, the jury heard testimony that the vulnerability of the production Pinto's fuel tank at speeds of 20 and 30-miles per hour in fixed barrier tests could have been remedied by inexpensive "fixes." However, Ford chose to produce and sell the Pinto to the public without doing anything to remedy the defects. Evidence of design changes that would have enhanced the integrity of the fuel tank system at relatively little cost *per car,* listed in the *Pinto case* decision, at pp. 775–776, included the following:

Pinto Auto Part	Cost of Part (per car)
Longitudinal side members	$2.40
Shock absorbent wrap for fuel tank protection	$1.80
A gas tank within a gas tank and placement of gas tank over axle	$5.08–$5.79
Nylon bladder within fuel tank	$5.25–$8.00
Placement of gas tank over axle with protective barrier	$9.95
Improvement and reinforcement of rear bumper	$2.60

Figure 2.5 The cost of replacement parts in the Ford Pinto case

Questions:

1. Why did Ford Motor Co. manufacture the Pinto automobile given the crash test results?
2. How did the court in this case apply the **Hand Formula**?
3. What were two of the defects in the Pinto automobile?
4. How much would it have cost Ford Motor Co., per car, to fix the defects you stated in answer to Question 3?
5. Do you agree with the jury's decision in this case?

As students of the law, you need to be aware that there cannot be a general rule stating when conduct leads to a breach of duty, because the facts differ in each case. What there can be, however, is the application of Judge Hand's formula to each unique set of facts when evaluating whether or not there has been a breach of duty causing injuries. The court will assess the cost of avoiding a defect in comparison with the probability and severity of injury.

2.1.4 Causation

The third element of a product liability lawsuit based on a negligence theory is **causation.** At trial, after establishing the existence of a legal duty between the disputing parties and a breach of that duty, the plaintiff must then prove that the defendant's negligence actually *caused* the injury or injuries. There is a two-pronged test when examining the element of causation. The plaintiff must prove that a defect in a defendant's product was both the (1) **actual cause** and (2) **proximate or legal cause** of the injury.

The test for proving the **actual or factual cause** is fairly simple. The plaintiff must show that *but for* a defect in the defendant's product, the plaintiff would not have been injured. This analysis is called the but for **test**. For example, take a case of an electric coffee maker that, after the fact, is found to have a faulty wiring connection. While the plaintiff is brewing coffee, the coffee maker catches fire and, tragically, ignites the plaintiff's home. The plaintiff suffers severe burns. At trial, this plaintiff would argue that *but for* the defective wiring in the coffee maker, there would have been neither the fire nor the injuries to her. The argument would be that the defective coffee maker was *the cause in fact* of a plaintiff's injuries, assuming nothing else caused the fire.

Proving **legal cause,** called **proximate cause,** is not quite as simple as establishing actual or the cause in fact. The analysis to establish proximate cause involves a closer study of the facts. Two legal concepts are used in this close factual analysis to establish proximate cause. These are **foreseeability** and **reasonableness.** To establish proximate or legal cause, the plaintiff must prove that the defect that caused plaintiff's injuries was a **reasonably foreseeable event** to the defendant**.** In other words: (1) was the manufacturer aware, as it designed the manufacturing process for its product, that a defect was possible (making it *foreseeable*), and, if a defect was foreseeable, then (2) could reasonable methods be used to prevent the defect and subsequent injury/ This two-tiered concept is one with which courts struggle, because courts attempt to be fair to both a defendant manufacturer and an injured plaintiff in a lawsuit.

As we just learned about duty and breach of duty, each factual situation behind any given product liability lawsuit is different. Consequently, there cannot be a unified or single rule for what can be considered *reasonably forseeable* by a manufacturer. Each determination of what could be reasonably forseeable is case-specific. Thus, even assuming that a defendant's product, in fact, caused a plaintiff's injury, the defendant will not be held liable for damages in most jurisdictions if the plaintiff's injuries were not reasonably foreseeable by the manufacturer in the making of the product. When examining the case facts, we must remember that reasonable conduct **means conduct that uses** due care**.** The key question is: *Did the manufacturer use due care knowing all that it knew about its product's performance?* When answering this question, it is very important to remember that *reasonable care* **does not mean** *perfect* care. The courts are always aware that a manufacturer must be able to operate its business by manufacturing products. However, part of the court's duty is to consider the manufacturer's process to make certain that the consumers/public are protected. The court decisions frequently talk about *balancing* the rights and interests of both the plaintiff and the defendant.

Looking again at our electric coffee maker example, if the court found that the manufacturer used state-of-the-art design and fire-protected wiring, the court could conclude that the manufacturer's conduct was reasonable in making the product. If the manufacturer tested selected coffee makers as they came off the production line, and none showed any tendency to catch fire, this fact would help the manufacturer show the reasonableness of its manufacturing process. The manufacturer would have a good chance of demonstrating that the fire in plaintiff's home was not a reasonably forseeable event but rather a freak accident. If the fire was a freak accident, the manufacturer would not be liable. Although the faulty wiring was the cause *in fact* of the injurious fire, the freak accident (fire) was not a reasonably forseeable event to the manufacturer and, therefore, *not the proximate or legal cause* of plaintiff's injuries. The manufacturer in this example acted reasonably and would not be found liable. It is good to remember here that a manufacturer does not have a duty to make a perfect product when considering a lawsuit based on negligence.

If we apply the two-pronged test of causation to the Pinto case, above, we can easily argue that the fire and explosion of the gas tank were *the cause in fact* of the plaintiffs' injuries. But, we cannot stop there with our analysis. We must examine the second prong of the causation test, and ask ourselves whether or not Ford's conduct in the manufacture of the Pinto was reasonable and whether the defect was foreseeable. Since Ford's own pre-production testing showed that the gas tank could explode, the explosion was a foreseeable event. Thus, the court found Ford negligent because the explosion and fire were both the cause in fact and the legal cause of reasonably foreseeable events, which caused the death of one plaintiff and severe injuries to the other.

How do the courts analyze what is reasonably foreseeable? As we have seen before, the courts follow precedent. It was the famous *Palsgraf* case that first introduced the legal concept of forseeability in lawsuits based on negligence.[30] The decision was written by Judge Benjamin Cardozo, then the chief judge of the New York Court of Appeals and later a U.S. Supreme Court justice. This case is still followed, and often quoted, in today's court decisions, including those in product liability based on negligence.

In the *Palsgraf* case, the plaintiff was injured by a scale on a railroad platform, which fell on her as a result of a fireworks explosion quite a distance from her at the other end of the platform. Helen Palsgraf sued the railroad, alleging the negligence of its employee caused her injuries. In this case, the actual cause of Mrs. Palsgraf's injuries was simple to see – *but for* the explosion, she would not have been injured; the explosion was the cause in fact of her injuries. However, Judge Cardozo said, something more was needed before a defendant could be held liable to pay for her injuries. As Judge Cardozo said in his decision, *that something more* was whether the cause injury was *reasonably foreseeable* such that a defendant could be held liable to pay damages for her injuries. What Judge Cardozo questioned was whether the explosion was reasonably forseeable, giving the defendant railroad a chance to remedy the situation before injury occurred. The trial court jury had found the railroad liable for Mrs. Palsgraf's injuries. But Judge Cardozo reversed the trial court's verdict and dismissed the case. Judge Cardozo held that the railroad and its employee could not be liable for plaintiff Palsgraf's injuries because the event that caused her injury was too far away from any alleged negligent act in the eyes of a reasonable person. Her injuries, even if there was negligent conduct by the railroad employee, were not a foreseeable result of the actions of the railroad worker, who was simply trying to help a passenger onto the train.

The Court Speaks

Figure 2.6 Railroad Station Platform

Palsgraf v. Long Island Rail Co., 162 N.E. 99 (N.Y. 1928)[31]

Facts:

Judge Cardozo stated the case facts as follows: Plaintiff Helen Palsgraf was standing on the railroad platform after buying her ticket to Rockaway Beach. At the other end of the platform, two men were running to catch a train that had started to move. One made it and the other, carrying a small package wrapped in newspaper, jumped aboard the car but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged and fell on the rails. The package contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks exploded when they hit the tracks, and the shock of the explosion caused some scales to fall at the other end of the platform many feet away. The scales struck the plaintiff, who was standing nearby, injured her, and she sued the railroad alleging the negligence of its employee had caused her injuries.

Discussion:

Judge Cardozo got right to the point in his decision in the *Palsgraf* case and ruled that: "The conduct of the defendant's guard…was not a wrong in its relation to the plaintiff standing so far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed." Id. at p. 99 (citations omitted).

In writing his opinion, Judge Cardozo also talked about the need to have all the elements of a tort present in order for a tort to occur. He reviewed the elements of duty between a plaintiff and defendant and a breach of that duty. Judge Cardozo then defined what the third element in negligence – causation – must involve. "Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right…'Proof of negligence in the air, so to speak, will not do'.… 'Negligence is the absence of care, according to the circumstances.' *Id*. at pp. 99–100 (citations omitted). He noted that "[t]he ideas of negligence and duty are strictly correlative." Judge Cardozo also wrote:

> One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

Id. at pp. 99–100.

It is interesting to note that Judge Cardozo explained that without caustion, the third element of a case in negligence, the tort itself could not exist. Thus, there was no basis on which to file a complaint to begin a lawsuit. "The law of causation, remote or proximate, is thus foreign to the case before us," he said, in dismissing Mrs. Palsgraf's complaint. *Id.* at p. 101.

Questions:

1. What caused the accident that led to Mrs. Palsgraf's injuries?
2. Why was Mrs. Palsgraf's distance from the explosion on the platform a key factor in the court's decision to dismiss her lawsuit?
3. Which of the four necessary elements for the tort of negligence was missing in the *Palsgraf* case?
4. Do you think the railroad employee's conduct was reasonable?
5. Why did the court state that Mrs. Palsgraf's injuries were not **reasonably foreseeable?**

2.1.5 Damages

The fourth and final element that must be present in a product liability lawsuit based on negligence is **damages.** Remember that the historic purpose of tort law in the U.S. civil law system is to find a way for an injured person to recover money damages (to be made whole) from the person (the tortfeasor) who is shown to be responsible for the injuries. If there are no injuries, there is nothing for a plaintiff to recover for. A person could purchase a defective coffeemaker or automobile,but, if the purchaser does not suffer any personal injuries from a resulting fire or crash, the purchaser remains whole and there is no legal basis to allow the matter to go to court as a lawsuit. As we have seen in our study thus far, without one of the necessary elements of negligence, duty, breach, and causation, a tort does not exist. Let us now examine damages, the fourth element in a product liability lawsuit based on negligence.

There are three possible categories of damages in the overall legal area known as tort law: compensatory, nominal, and punitive. These are summarized in the chart below. Whether a particular state allows recovery of one, two or all three of these types of damages in a given type of case is something the student must research on a state-by-state basis. Some torts that are not the subject of our study here allow for the recovery of **nominal damages.** Nominal damages are a minimal amount of money awarded in some tort cases where the plaintiff does not suffer any physical injuries. A judge may impose nominal damages, such as attorney fees, against a party to send a message that trivial disputes should not be brought before the court. However it is very important to remember that this is not true for product liability lawsuits based on negligence. **Compensatory damages** are always a part of a negligence lawsuit. In a product liaiblaity lawsuit the plaintiff must suffer significant physical harm (damages) to support the filing of a lawsuit. Without this fourth element of compensatory damages, there is no tort in negligence and thus no lawsuit.

The Three Categories of Damages

(1) COMPENSATORY	**(2) NOMINAL**	**(3) PUNITIVE**
These damages make the plaintiff *whole*. There are **two** types: A. Special Damages: those damages specific to the plaintiff, e.g., wage loss, medical bills. B. General Damages: those damages that are generally anticipated as a result of injury, e.g., pain and suffering.	These damages can be awarded in some tort cases when the plaintiff does not suffer any actual physical damages. These damages are **NOT AVAILABLE** in a negligence case.	These damages are designed to punish the defendant.

Figure 2.7 The Categories of Damages

A primary focus for damages, in any negligence product liability lawsuit, is the computation of **compensatory damages**. As the term implies, **compensatory damages** means the damages, in dollars, sought by the injured plaintiff to restore the plaintiff's losses. These damages are placed in two categories, *special damages* and *general damages*. At trial, the plaintiff must present evidence of these damages. For special damages, this is done by computing specific financial loss to the injured plaintiff, such as lost wages and medical bills. Often an economist is called as an expert witness at trial to explain to the jury how much these losses are over a plaintiff's lifetime. Special damages can usually be computed to a specific amount.

General damages are a little harder to arrive at because they do not have a specific basis in a dollar amount that can be computed, like wage loss. Instead, general damages are those that are intended to compensate the plaintiff for losses that are more personal and not strictly financial, such as pain and suffering. These are damages that can be anticipated as a result of injuries. Although there is no specific rule for the computation of these damages, attorneys can be very creative in arguing for these damages. For example, an attorney could ask for ten cents per hour for every waking hour of pain suffered by the injured plaintiff over her lifetime. General damages can be huge sums, depending upon the facts of the case. We should keep in mind that the idea behind compensatory damages is to try to make the plaintiff whole. Making a plaintiff an unexpected millionaire through a windfall of damages is not the purpose of general damages. If a defendant feels that he has been found liable for general damages that are too high, the defendant will appeal the verdict and ask the court to reduce this amount.

Punitive damages, **sometimes called exemplary damages,** are intended to punish the defendant for the most horrific of misconduct. The topic of punitive damages is presently in a great deal of flux and fosters much debate among legal scholars. Some states have eliminated punitive damages or instituted caps on the amount that can be awarded. It is this category of damages that often is at the center of tort reform legislation in the U.S. Punitive damage awards are frequently appealed, as was done by defendant Ford Motor Co. in the Ford Pinto case that we studied above. The jury awarded Plaintiff Grimshaw $125 million in punitive damages, in addition to an award of $2.5 million in compensatory damages. The trial court judge reduced Mr. Grimshaw's punitive damage award to $3.5 million, and Ford appealed only the punitive damage award.[32] (**Remitter** is the legal term which means that a jury's award is reduced by the judge because the judge believes the amount of damages is excessive.) The Ford Pinto case gives us a good summary of the arguments typically raised both for and against punitive damages in product liability cases.

Ford argued that an award of punitive damages required a type of malice on the part of Ford that was not proven. Ford also argued that, even with the remitter, the punitive damage award was excessive.

The court denied Ford's appeal to eliminate the punitive damages award, and said: "The concept of punitive damages is rooted in the English common laws and is a settled principle of the common law of this country." Among its reasons for the denial, the court said that the law permitted punitive damages where a defendant's conduct evinced "a conscious disregard of the probability that the actor's conduct will result in injury to others." *Id*. at 808 (citation omitted).

The court disagreed with Ford's argument that the company did not engage in malicious conduct when manufacturing the Pinto and said: (**Malicious** means intentional conduct.)

> There is substantial evidenced that the management was aware of the crash tests showing the vulnerability of the Pinto's fuel tank to rupture at low speed rear impacts with consequent significant risk of injury or death of the occupants by fire…. While much of the evidence was necessarily circumstantial, there was substantial evidence from which the jury could reasonably find Ford's management decided to proceed with the production of the Pinto with the knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and lives of the occupants. Such conduct constitutes corporate malice.

Id. at 815.

The court also said:

> Punitive damages thus remain as the most effective remedy for consumer protection against the defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so, which can be considerable and not otherwise recoverable.

Id. at 811.

One argument against punitive damages is the possibility that excessive awards will bankrupt a defendant. A second argument is that punitive damages are not related to plaintiff's injuries. This debate continues to be argued in the courts and legislatures in the United States.

Questions:

1. What are the three general **categories of damages** in a tort lawsuit?
2. Can **nominal damages** be awarded in a product liability lawsuit based on negligence?
3. What is the purpose of **compensatory damages**?
4. What are the two sub-categories of **compensatory damages**?
5. What is meant by **punitive damages**?
6. List two arguments in favor of and two arguments against the award of punitive damages in a product liability lawsuit.

2.1.6 Applying the Negligence Theory in Product Liability Lawsuits

Now that we have reviewed the theory of negligence itself, let us turn to how negligence is applied in product liability lawsuits. There are **three main applications of the negligence theory.** These applications encompass each step in the manufacturing process, the: (1) *negligent design*, (2) *negligent manufacture,* and (3) *negligent failure to warn.* In determining liability under the negligence theory, the courts apply the Hand Formula of cost-benefit analysis to each of these three steps in the manufacturing process. The evidence at trial often involves expert analysis of costs vs. benefits, as well as testimony on design, reasonable alternatives to make a product safer, and whether a product was manufactured with a defect.

(1) Negligent Design

Recall from our discussion about the element of causation in negligence that the focus of the negligence theory is **reasonable conduct**, and that reasonable conduct involves the use of *due care*. Also recall that *reasonable* care does not mean *perfect* care. A definition of **negligent design** has been perplexing for the courts. The idea of design defectiveness has been called *the heart* of product liability law. Yet, finding an acceptable definition for what constitutes 'defective design' is a difficult task. As we have learned, the courts decide if a design defect exists in a product by looking at the facts of each individual case.[33]

When designing the product, the manufacturer makes decisions that will affect the safety of the entire product line. These decisions include: the types and strengths of raw materials and component parts, the manner in which they are combined into the finished product, whether safety devices are included, the overall product concept, and the type and extent of prototype testing to ensure that the product works and works safely when put to use.[34] We saw how Ford Motor Co. was found liable to the Plaintiffs because the jury found that Ford disregarded what it was told by its engineers concerning the design safety of the Pinto. and severe injuries occurred because of this disregard.

In order to determine whether a product was negligently designed, the legal test includes an analysis of reasonableness in the actions of the designers. That test is: "Whether a reasonable alternative design would, at a reasonable cost, have reduced the foreseeable risks of harm posed by the product. And, if so, whether the omission of the alternative design rendered the product not reasonably safe."[35]

There are **three categories of design defects** seen in the case law: (1) *structural defects*, (2) *absence of needed safety features,* and (3) *foreseeable misuses* of the product. The Ford Pinto case gives us good examples of design defects involving (1) structural defects and (2) the absence of safety features. Let us take a moment to examine the third category, foreseeable misuse. Remember here that a manufacturer's duty in designing a product does not mean that the manufacturer most provide a perfect product. The duty is not to provide the most durable design; only to provide a design that is reasonably safe. A common defense raised when a manufacturer is sued on a theory of negligence is that it product was *misused,* and this caused the danger and eventual injury. What evidence will a court analyze to determine whether a product was misused to the extent that the manufacturer should not be heldliable? Or, to put this question another way, what factors are considered by the courts when deciding if a product was misused? If you are thinking that the answers to these questions will likely involve the ideas we studied above about reasonableness and forseeabilty, you are correct and growing in your understanding of negligence law and how it applies to design defects. In fact, the courts take a look at whether or not the misuse by a consumer was *reasonably foreseeable* by the manufacturer.

Considering whether *misuse* could be reasonably foreseeable at first blush seems incongruous or rather odd. However, the courts do examine whether or not the manufacturer took reasonable design precautions to protect a plaintiff against the danger of misuses of the product. A good example of a foreseeable misuse is the idea of the **crashworthiness** of vehicles. Realistically, we know that cars will be involved in accidents. As a result, both drivers and passengers can potentially be injured when using the vehicle. **Crashworthiness** means that the vehicle design is such as to reasonably protect against the collision that occurs inside the vehicle (the second collision) after the outside of the car is involved in an impact. Courts have held that second collisions are clearly foreseeable, and manufacturers have an obligation to make vehicles reasonably safe in the event of such crashes.

(2) Negligent Manufacturing

The next application of the negligence theory in lawsuits involving products is **negligent manufacturing** of the product. Once a reasonably safe design has been drafted, the product must be made or manufactured in a reasonably safe manner that follows the design. The manufacturer is held to a duty of reasonable care throughout the manufacturing process. This means that the manufacturer must avoid mistakes that can cause harm to the foreseeable consumer. This duty applies to each step of the manufacturing process – from choosing and testing the raw materials to be used for the product to the construction, assembly and preparation of the product for distribution to the consumer. Even when a manufacturer exercises the utmost of care, it is possible that some products will contain manufacturing flaws that are dangerous to users or third parties. It is for this reason that manufacturers implement quality control and quality assurance systems, including sampling and testing of products off the assembly line. These systems demonstrate that the manufacturer was using reasonable care.[36] An example of this would be when the manufacturers of breakfast cereal regularly test the cereal at all points of production, both before and after the cereal product is boxed.

(3) Negligent Failure to Warn

A manufacturer also has a duty to adequately warn consumers about foreseeable injuries that can occur when using the manufacturer's product. As a general rule, the **duty to warn** involves two parts: (1) a duty to warn the user against hidden dangers and (2) a duty to instruct users on how the use the product to avoid these dangers.[37] The basic philosophy behind this duty is that the manufacturer has greater knowledge about its product and any potential harm it may cause. This greater knowledge creates and imposes on the manufacturer a duty to warn of potential harm. If the proper warning is not on a product, the manufacturer can be held liable for failure to warn. Each of us can think of an example of a warning on a product that we have purchased. A few such warnings that come to mind include: *Do not use if the seal is broken on the bottle; WARNING! Do not use this electrical extension cord around water;* and *DO NOT USE bug repellant around your eyes.*

Figure 2.8 A sign warning about high electrical power

Again, the **reasonable person** test enters the equation when the courts evaluate whether there should be liability for negligently failing to warn. Liability for warning defects is limited to *foreseeable risks of harm.* That means that the harm could have been avoided by the consumer if the manufacturer provided reasonable instructions or warnings. It is important for you to note that placing a warning on a product does not relieve the manufacturer of its duty to safely design and manufacture the product. "A manufacturer may not merely slap a warning onto dangerous products and absolve himself of any obligation to do more.

…a warning is not a Band Aid to cover a gaping wound, and *a* product is not safe simply because it carries a warning."[38]

As we have seen, the legal theory of negligence is has many facets. Consequently, most product liability lawsuits in the U.S. are based on negligence. In the next two chapters, we will turn to two other legal theories that are used in product liability lawsuits, although not as often. These are breach of warranties and strict liability.

2.1.7 Summary

In this chapter you learned about the important negligence theory in American product liability law. You learned that there are four essential elements –**duty, breach**, **causation**, and **damages**–-that must be proven to successfully bring a lawsuit based upon the negligence theory of recovery. You also learned about important cases that defined these elements and saw how U.S. judges wrote key rules of analysis for the elements that still apply today. These cases were the *Carroll*, *Palsgraf* and Ford Pinto cases. You reviewed how the negligence theory is actually applied by plaintiffs when they file lawsuits based upon the three theories of: negligent design, negligent manufacturing and negligent failure to warn.

2.1.8 Key Terms

Breach of duty
Causation
- Actual cause
- Proximate cause

Completeness
Crashworthiness
Damages
- Compensatory damages
- Nominal damages
- Punitive damages

Defect
Due care
Duty
Forseeability
Judge Learned Hand
Liable/liability
Negligence
    Negligent design
    Negligent manufacture
    Negligent failure to warn
The Hand (Calculus of Risk) Formula
The *Palsgraf* case
Reasonable
    The *reasonable* person
    Reasonable conduct
Remitter
The *but for* test

2.1.9 Chapter Discussion Questions

1. What is meant by the term *negligence*?
2. What are the four elements of the tort of negligence?
3. What are the three theories of negligence used in product liability lawsuits?
4. What are the three categories of damages that can be awarded in a product liability lawsuit? Define each category of damages.
5. Who was Judge Learned Hand?
6. Explain the *Hand Calculus of Risk* Formula.
7. Explain how the court used the Hand Calculus of Risk formula in the *Ford Pinto* case.
8. What were the facts of the *Palsgraf* case?
9. Which of the four elements of negligence did the *Palsgraf* case address?
10. How did Judge Cardozo define proximate cause in the *Palsgraf* case?
11. Define actual cause. How does actual cause differ from proximate cause?

2.1.10 Test Your Learning

1. Sarah suffered severe burns when a defective coffeemaker exploded near her.
   To recover her medical costs and lost wages, Sarah would ask for what type of damages if she sued the maker of the defective coffee maker?
   a) Punitive damages
   b) Nominal damages
   c) Compensatory damages
   d) None of the above

2. Which of the following is the Hand Calculus of Risk Formula?
   a) 2+2 = 4
   b) If **P** × **L** > **B,** then liability attaches
   c) If **B** × **L** > **P,** then liability attaches
   d) E=mc2
   e) If P × L < B, then liability attaches

3. Which answer correctly lists the four elements of negligence?
   a) Breach, duty, defect, risk
   b) Liability, breach, risk, defect
   c) Duty, breach, causation, damages
   d) None of the above

4. Which answer best defines *reasonable conduct*?
   a) Foreseeable actions
   b) Conduct that uses due care
   c) Perfect care
   d) All of the above

5. What is another term for *proximate* cause?
   a) A cause that is nearby
   b) Actual cause
   c) Contributing cause
   d) Legal cause

6. In the *Palsgraf* case, what phrase did the court use to define proximate cause?
   a) Actual cause
   b) Legal cause
   c) An unforeseen event
   d) A reasonably foreseeable event

7. Which answer best describes the duty of a product manufacturer?
   a) A duty to use reasonable care in making a product
   b) A negligible duty
   c) A duty to sell a perfectly made product
   d) A duty to sell an inexpensive product

8. The basis for any product liability lawsuit is that the product has a:
   a) Good pedigree
   b) Strength to withstand below-zero temperatures
   c) Defect
   d) Million-dollar sales potential

9. In the Ford Pinto case, the jury's award for which type of damages was appealed by Ford Motor Co.?
   a) Compensatory damages
   b) All of the damages
   c) Punitive damages
   d) None of the damages

10. What are the two categories of compensatory damages?
    a) Punitive and nominal damages
    b) Pain and suffering damages
    c) Special and general damages
    d) Property and land injury damages

Test Your Learning Answers are located in Appendix A.

3 Legal Theories of Recovery in Product Liability: Breach of Warranties

In Chapter Two, we explored negligence, the predominant theory in product liability lawsuits in the U.S. Let us now move on to talk about another theory, that of **breach of warranty**. This single theory involves two types of warranties, **express warranties** and **implied warranties.**

Objectives

After completing this chapter, the student should be able to:

- Understand the legal history behind breach of warranty claims;
- Define and discuss what is meant by the term express warranty;
- Define and discuss the differences between an express warranty and an implied warranty;
- Define and discuss the implied warranty of merchantability; and
- Define and discuss the implied warranty of fitness for a particular purpose.

Introduction

When someone buys a product, they purchase it for many reasons. Often times that reason is based on certain promises the manufacturer makes about the product. For example, perhaps a consumer is buying a car based on the great mileage rating, because she is looking for a fuel efficient vehicle. The mileage rating is a promise or **warranty t**hat the manufacturer makes to the consumer. **Breach of warranty** means that a manufacturer or seller of a product (the car) did not fulfill the promise or representation made to a consumer about the quality, type or performance abilities of the product. Using our car example, if the car actually got only 15 miles-per-gallon, when the manufacturer promised 20 miles-per gallon, this would be a breach of warranty.

If this occurs, the person making the promise, the **warrantor**, will be held liable for the misrepresentation. One way to think about warranties is that warranties *travel* with the product as the product moves from the manufacturer/seller to the purchaser/consumer. The breach of warranty theory developed as part of both contract and tort law. This idea of the blending of two legal theories should sound familiar to you from our discussion in Chapter One about the beginning of tort laws in the United States.

Figure 3.1 A warranty *travels* with the product

You should remember that in the early years of product liability law the courts were starting to depart from the stricter rules of contract law, such as privity, in trying to protect consumers. Similarly, as warranty claims increased, the courts searched for a way to award personal injury damages, not just limited contract law damages, to the consumer. The first cases for breach of warranty claims were for breaches of implied warranty involving products for human consumption, such as food and beverages. For example, if a pub customer bought a meal and a drink, it was implied that the food and drink were not rotten or stale. Privity was abandoned in these cases, as we saw that the courts used a negligence theory to allow the ultimate consumer of the bad food or drink, and not just the pub owner, to bring a breach of warranty claim against the manufacturer/supplier. We will see how the case law expanded, so that by the 1930s a consumer could now also use the theory of breach of an express warranty to sue not just the manufacturer, but also the seller (pub owner) from whom the consumer purchased the bad food.

We will review two court decisions, decided almost 30 years apart, and see how the U.S. law of warranties grew and developed. You will notice that once again these cases involve defects in automobiles. We want to keep in mind that the introduction of the automobile had a huge impact on society and the judicial system. Consequently, a lot of product liability lawsuits involving issues of car defects began making their way through the U.S. courts in the early 1900s. Warranty theories are frequently alleged along with claims of negligence in a product liability lawsuit brought by an injured consumer. A warranty claim can also be the sole basis for a lawsuit if a product fails but no personal injuries result from this failure. Damages for this type of claim can include the consumer's lost profits and the replacement cost of the failed product.

As the warranty theories developed, states and the U.S. government also passed laws (statutes) to protect the consumer. Examples of these are the **Magnuson-Moss Warranty Act** and the **Uniform Commercial Code (UCC)**, which have been adopted by all 50 states.[39] You should always include a review of federal and state statutes whenever researching a question about warranties. A brief word about the UCC is in order here. The UCC was first developed in the 1950s by the National Conference of Commissioners on Uniform State Laws and the American Law Institute as a model set of statutes recommended for adoption by the states. The purposes of the UCC were to simplify, clarify, modernize and bring consistency across the U.S. to the law governing commercial transactions. These transactions include the sale of goods, which is the topic of a part of the UCC called "Article 2." When a product is defective but does not cause a personal injury, we want to check what remedy may be allowed under Article 2 of the UCC between the buyer and seller of the goods. However, if a personal injury is caused by a defective product, U.S. product liability law reverts to the use of the common law in combination with any personal injury statutes that a state may have. You should think of the UCC as regulating the field of commercial law, including the buying and selling of goods. In contrast, what we are studying is how U.S. tort law applies in a product liability lawsuit when a person has been injured by a defective product.

3.1 The Express Warranty Theory

An **express warranty** is defined as "One created by the overt words or actions of the seller.[40]

In an express warranty, the product seller communicates that a product possesses certain qualities by making a verbal statement to the purchaser. Or, the seller can give the purchaser a written statement, which outlines the capabilities of the product. For example, take a case of a dairy farmer who purchases a large, new, and very expensive automatic milking machine. The manufacturer includes a large manual with the machine that expressly states how efficient this milking machine is and how the machine greatly reduces milk loss during the milking process and, thus, will increase a farmer's profits. The seller repeats this statement to the farmer verbally when the machine is sold. During the first week of use, the machine leaks. After one month of milk leaking from the machine's piping mechanisms, the farmer complains to the seller, who refuses the return of the machine. Because the farmer cannot operate his business using the faulty machine, the farmer is forced to sue the manufacturer and the seller for the cost of the purchase and for the lost profits on the milk. The farmer's lawsuit would be based on breach of warranty, specifically a breach of the express warranty made about the milking machine's capabilities.

The Court Speaks

Figure 3.2 The *Baxter* case involved breach of express warranty for a shattered windshield

Baxter v. Ford Motor Co.,12 P.2d 409 (Wash. 1932)[41]

(Note: Quotations are from the case as reported in the Washington State Supreme Court Reporter, 168 Wash. 456)

Facts:

This case was involved a car windshield that shattered, causing an accident that resulted in serious eye injuries to the Plaintiff Baxter and demolished the automobile. The case focused on a claim of breach of express warranty brought by the consumer against both the car dealership (the seller) and the car manufacturer. You should note that the decision was in 1932, early in the development of product liability law, and the fact that the court abolished the need for privity of contract between the purchaser and the car manufacturer. *Baxter* is considered the leading case allowing a breach of express warranty claim by the consumer against the car manufacturer, not just against the dealer that sold him the vehicle. Remember that this is the second time in our study of the development of U.S. product liability law that we have seen the court abandon the requirement for privity of contract in permitting a consumer to sue the car manufacturer directly. In Chapter One, we saw the court, in the 1916 *MacPherson* case, eliminate the need for privity of contract and permit a consumer to sue the car manufacturer for a defective wheel, using a negligence theory. Now, some years later, the court permitted a claim, without privity of contract, under a second theory, breach of implied warranty. U.S. product liability law was expanding to adapt to the increasing need of a growing society for consumer fairness. The courts were moving away from the limitations of contract law and its need for privity as theories for product liability lawsuits developed.

Now let's return to the facts of the *Baxter* case. Mr. Baxter bought his Model A Ford from defendant St. John Motors, a Ford dealer that bought the vehicle from the manufacturer, defendant Ford Motor Co.. Mr. Baxter claimed that both defendants told him that the automobile's windshield was "made of non-shatterable glass which would not break, fly or shatter." *Baxter,* 168 Wash. at 458. While Mr. Baxter was driving his automobile through Snoqualmie pass, a pebble from a passing car struck the windshield, causing small pieces of glass to fly. Mr. Baxter suffered permanent loss of vision in his left eye and damage to his right eye from the flying pieces of windshield glass.

Discussion:

Before trial began, the court ruled that Mr. Baxter's attorney could not show the jury catalogues and printed materials that had been written by Ford Motor Co. for distribution with the car to aid in its sales. The trial court withheld the evidence because of the contract doctrine of privity and dismissed the case against Ford Motor Co. before the trial began. There was nothing in the sales agreement between Mr. Baxter and the defendant dealership that included a warranty between Mr. Baxter and Ford Motor Co. The appellate court, in its decision, quotes from these printed sales materials at page 459:

> TRIPLEX SHATTER-PROOF GLASS WINDSHIELD. All of the new Ford cars have a Triplex shatter-proof glass windshield – so made that it will not fly or shatter under the hardest impact. This is an important safety factor because it eliminates the dangers of flying glass – the cause of most of the injuries in automobile accidents. In these days of crowded, heavy traffic, the use of this Triplex glass is an absolute necessity. Its extra margin of safety is something that every motorist should look for in the purchase of a car especially where there are women and children.

The appellate court unanimously overturned the trial court's ruling against allowing the sales documents into evidence. The appellate court said that it was for the jury to determine whether Ford Motor Co.'s failure to equip the windshield with glass that did not fly or shatter was the proximate cause of Mr. Baxter's injuries. This is what the Baxter court said about the doctrine of privity in an express warranty claim:

> To the old rule that a manufacturer is not liable to third persons who have no contractual relations with him,…should be added another exception…arising…from the changing conditions of society…
>
> …the automobile was represented by the manufacturer as having a windshield of non-shatterable glass "so made that it will not fly or shatter under the hardest impact." An ordinary person would be unable to discover by the usual and customary examination of the automobile whether glass which would not fly or shatter was used in the windshield.
>
> Since the rule of caveat emptor was first formulated vast changes have taken place in the economic structures of the English speaking peoples…. Radio, bill boards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract…deny the consumer the right to recover…

Id. at pp. 461–463

Questions:

1. What were the key facts in the *Baxter* case?
2. What does **breach of an express warranty** mean?
3. Why did Mr. Baxter lose his case at the trial court level?
4. What issue did the appellate court say that the jury should consider at the re-trial of Mr. Baxter's case?
5. What was the express warranty in the *Baxter* case?

Below, we will review *Henningsen v. Bloomfield Motors, Inc. and Chrysler Corp.,* 32 N.J. 358, 161 A. 2d 69 (1960)[42], another breach of warranty case. However, this case will turn our focus to **breach of implied warranty**.

3.2 The Implied Warranty Theory

Implied warranties are divided into two categories, the (1) warranty of merchantability and (2) warranty of fitness for a particular purpose. Although these warranties do not involve affirmative statements by the seller to the consumer, they are based on reasonable assumptions by a consumer. The law says that an **implied warranty of merchantability** attaches to the product, and the consumer who purchases it has the right to assume that the product meets certain standards of quality, and that the product will be *fit for the ordinary purposes for which it was purchased*. Simply put, if you buy a toaster it should toast bread. If you buy a dishwasher, it should wash dishes when you turn it on. In order to carry the implied warranty, there is no requirement that the box containing the product describe the purpose of the product – rather, the law will assume that the product is fit for its ordinary use. If the product is not fit for its ordinary purpose, the manufacturer or seller could be held liable for breach of its duty to provide a fit product.

The **implied warranty of fitness for a particular purpose** attaches when the seller knows the *particular purpose* for which the product will be used by the buyer/consumer. For example, consider a car manufacturer called "Automaker," which buys nuts and bolts to fasten bumpers to the car body. Automaker enters into a contract with the company that makes the nuts and bolts (called "Acme Bolts"). Automaker tells Acme Bolts exactly the dimensions and types of nuts and bolts it needs for its bumpers. When Acme makes the nuts and bolts according to the specifications and sells them to Automaker, the purchaser has an implied warranty of fitness for a particular purpose from Acme. If Acme does not make its products according to the right specifications, it will breach its duty to Automaker, which could then file a claim against the Acme for breach of the implied warranty of fitness for a particular purpose.

Earlier we saw the court in the *Baxter* case extend a manufacturer's liability to the consumer to include *express* warranties. In a later case, *Henningsen v. Bloomfield Motors, Inc., and Chrysler Corp.,* the defendant auto manufacturer attempted to disclaim any liability for *implied* warranties. The Supreme Court of New Jersey disagreed with the argument and ruled against Chrysler. The court said that implied warranties extend to the ultimate purchaser of the automobile and not just to the car dealer who buys the cars for resale. This case is followed in most U.S. states and is considered the leading case that ruled that manufacturers cannot disclaim implied warranties. You should be aware that the *Henningsen* decision provides a well-written, detailed summary of the history of privity and its elimination in U.S. product liability cases. The case also provides a good summary of the history of implied warranties, from the earlier application to food products to the modern law involving car manufacturers.

The Court Speaks

Henningsen v. Bloomfield Motors, Inc., and Chrysler Corp., 32 N.J. 358, 161 A.2d 69 (N.J. 1960).[43]
(Note: Quotations below are from 32 N.J. 358, the state reporter.)

Facts:

The plaintiff Mrs. Henningsen was given a new Chrysler by her husband as a Mother's Day gift. On the day of the accident, her new car had only 468 miles on it, and Mrs. Henningsen was driving at 20–22 miles per hour. Suddenly, she explained to the jury, she heard a loud noise "from the bottom near the hood. It felt as if something cracked." The steering wheel spun in her hands; the car veered sharply to the right and crashed into a highway sign and a brick wall. An eyewitness testified that he had observed the car approaching him in normal fashion from the opposite direction when "all of sudden it veered at 90 degrees…and right into this wall," the witness testified. Mrs. Henningsen was injured and the car demolished from the impact. *Id*. at 369.

The Henningsens sued the dealership and the manufacturer, Chrysler, for negligence and breach of both express and implied warranties. While the negligence claims were dismissed, the court's decision focused on the manufacturer's attempt to disclaim the implied warranty of merchantability. As we saw with express warranties in the *Baxter* case, the car manufacturer in this case time tried to argue that any implied warranties were only between Chrysler and the dealership, based upon the (fading) doctrine of privity of contract. The defendant appealed the jury verdict in plaintiffs' favor, and the New Jersey Supreme Court upheld the verdict.

If you read this case in its entirety, you should observe how the court disparaged the warranty forms used by defendant Chrysler and promoted by the Automobile Manufacturers Association to which the defendant belonged. The court said that the warranty form, tiny print and all, was:

> …imposed on the consumer. He must take it or leave it, and he must take it to buy an automobile. …The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of express warranty. Where can the buyer go to negotiated for better protection? Such control and limitation of his remedies are inimical to the public welfare and, at the very least, call for great care by the courts to avoid injustice through application of strict common law principles of freedom of contract…. Thus there is lacking a factor existing in more competitive fields, one which tends to guarantee the safe construction of the article sold (quotation omitted)

Id. at 392.

Discussion:

Prior to this 1960 decision, implied warranty claims were primarily focused on lawsuits over injuries from food and drink. Thus, in the *Henningsen* case, Chrysler, argued that its damages should be limited to paying only for the repair of the defective part as described in the *express* warranty in the sales documents. This case did not involve food and drink, the argument went, so the law did not support liability against Chrysler for breach of an implied warranty. This would mean that Chrysler would pay only for the defective car part and not for the entire car, which was destroyed as a result of the defective part. The court ruled that the plaintiff could recover for all damages caused by the defective part under a *theory of implied warranty of merchantability.* Note that the court also abolished the idea of privity for implied warranties in this case. This allowed a car manufacturer, here Chrysler, to be held liable for all warranties, express and implied, for the first time in the history of U.S. product liability law.

The court noted that Mr. Henningsen admitted at trial that he did not read the complete warranty form that disclaimed any implied warranties. The warranty form stated that all Mr. Henningsen could do, if there was something wrong with the car, was to send the defective part back. The court described its concern for car buyers in the modern marketplace, given the manufacturer's practice of denying any implied warranties. The court also reproached the defendants for their use of very small type and the location of the warranty language, seemingly buried toward the end of the contract of sale. *Id.* at 366.

In finding Chrysler liable for breach of the implied warranty, the court explained that in the ordinary case of the sale of goods by description an implied warranty of merchantability is an integral part. Because the Henningsens purchased the car to drive it and relied on the dealer's knowledge about the car's ability to perform, the court said: "…if the buyer expressly or by implication, makes known to the seller the particular purpose for which the article is required and it appears that he has relied on the seller's skill or judgment, an implied warranty arises of reasonable fitness for that purpose…(the) warranty simply means that the thing is sold is reasonably fit for the general purpose for which it is manufactured and sold." *Id.* at 371 (citations omitted).

The court also said, quoting from a case written Justice Cardozo in a New York implied warranty case: "The distinction between a warranty of fitness for a particular purpose and of merchantability in many instances is practically meaningless…. Perhaps no more apt illustration of the notion can be thought of than the instance of the ordinary purchaser who informs the automobile dealer that he desires a car for the purpose of business and pleasure driving on the public highway." *Id.* at 371 (citations omitted).

The court reminded the defendants that the law was changing, and that new legislation was intended to protect buyers of automobiles and other goods and: "to ameliorate the harsh doctrine of caveat emptor,… and in some measure this imposed a reciprocal obligation on the seller to beware." *Id.* at 373.

Questions:

1. What were the key facts in the *Henningsen* case?
2. What implied warranty did the court hold Chrysler liable for in the case?
3. What did the court say about the standardized warranty form used by the automobile manufacturers at this time in U.S. history?
4. What did the court say about the manufacturer's claim of privity?
5. What did the court say about the purpose for new legislation for car buyers?

Remember to research individual state laws to see how the uniform Commercial Code (UCC) is used in a particular jurisdiction. Begin your research with a review of the UCC. The UCC outlines for you the specific terms for all warranties and the damages permitted for breach of these warranties when a contract for the sales of goods is in dispute.

3.3 Summary

In this chapter you learned how, as time passed, the courts in the U.S. were extending protection to consumers if they purchased a defective product. You saw how two leading court cases applied warranty protection to defective automobiles as the law expanded and automobiles became a cultural fixture in the U.S. You learned about what is meant by an express warranty and also what is meant by the two implied warranties of (1) fitness for a particular purpose and (2) merchantability. You learned how it is tort law, and not the UCC, statutory law, that deals with claims for injuries to consumers caused by a defective product. You also learned how these warranty theories were developed in two leading court cases to be applied in a product liability case where a consumer is injured by a defective product.

3.4 Key Terms

Breach of Warranty

Express warranty

Implied warranty

Implied warranty of fitness for a particular purpose

Implied warranty of merchantability

Magnuson Moss Act

UCC

Warranty

3.5 Chapter Discussion Questions

1. What is meant by the term warranty in the sale of a product?
2. Why are warranties important for a consumer?
3. What is the definition of the implied warranty of merchantability?
4. What is the definition of the implied warranty of fitness for a particular purpose?
5. Why was the court in *Henningsen* concerned about protecting consumers who bought automobiles?
6. What warranty did the court in the *Baxter* case uphold against the car manufacturer?
7. What warranty or warranties did the court in the *Henningsen* case uphold against the car manufacturer?
8. After the *Baxter* and *Henningsen* cases, did U.S. courts uphold the contract doctrine of privity in product liability lawsuits?
9. What comments did the court in the *Henningsen* case make about the warranty form used by the automobile manufacturers in the U.S.?
10. By the year 1960, when the *Henningsen* case was decided, how had product liability law changed in the U.S?

3.6 Test Your Learning

1. In the *Baxter* case, the court addressed what category of warranty?
   a) Implied warranty of merchantability.
   b) Express warranty
   c) Implied warranty of fitness for a particular purpose
   d) None of the above

2. Michelle bought an electric frying pan from her local hardware store. She took her new kitchen appliance home, unboxed it and found a leaflet in the box entitled *Express Warranty Information.* In this leaflet was the sentence: ***This appliance requires little energy and will not catch fire.*** When Michelle plugged her new appliance into the electrical socket, the plug sparked, then burst into flames and within a few seconds, Michelle's wall was on fire from the defective pan. If Michelle files a claim against the manufacturer for damages, which warranty or warranties would she allege were breached?
   a) An express warranty against fire
   b) An implied warranty of fitness for a particular purpose
   c) An implied warranty of merchantability
   d) All of the above

3. When the court in the *Henningsen* case reviewed the warranty document, the court was concerned about what?
   a) The gross inequality of the bargaining positions between the consumer and the car manufacturer that the document revealed
   b) The profit that Chrysler made on the sale of the automobile
   c) The fact that the car was purchased as a Mother's Day gift for Mrs. Henningsen
   d) The relationship between the car dealership and the manufacturer

4. Breach of implied warranties were historically limited to:
   a) Claims about horse-drawn carriages
   b) Claims about old cars
   c) Claims involving sales of food and drink
   d) Claims for old bicycles

5. In the *Henningsen* case, what warranties did the court extend to the consumer for the first time?
   a) Express warranties
   b) Sales warranties
   c) Implied warranties
   d) Warranties against flat tires.

6. The Moss-Magnuson Act is an example of:
   a) A criminal statute
   b) A consumer protection statute
   c) A state statute
   d) None of the above

7. What is the purpose of the Uniform Commercial Code (the UCC)?
   a) To complicate the law involving the sale of products
   b) To help the courts clarify sales of products
   c) To help plaintiffs with lawsuits
   d) To simplify, clarify and bring consistency to the law governing commercial transactions

8. In the *Henningsen* case, defendant Chrysler argued that its damages should be limited to:
   a) Compensatory damages
   b) Punitive damages
   c) Paying only for the repair of the defective part described in the express warranty
   d) None of the above

9. What does the term *warrantor* mean?
   a) The manufacturer or seller who makes a promise about a product's performance
   b) The person who delivers the keys to a new car to the consumer
   c) The sheriff who must find a criminal
   d) The manufacturer must always pay damages for a defective product

10. What does the term *breach of warranty* mean?
   a) That the buyer of a new car did not know how to drive it
   b) That the manufacturer of a product did not fulfill his promise to the consumer about the performance of the product
   c) That the seller of a product could not determine a fair market price for the product
   d) None of the above

Test Your Learning Answers are located in Appendix A.

4 Legal Theories of Recovery in Product Liability: Strict Liability

We will now turn to the theory of strict liability in our study of U.S. product liability law. We will see that the strict liability theory is very different from our study of the negligence theory. Recall that the negligence theory centers on whether or not *due care* was used or exercised by the product manufacturer. In strict liability, the focus shifts to the safety of the *product* itself. Whether or not the actions of the manufacturer showed due care are not even part of the analysis. The idea behind **strict liability** is that the product is so inherently dangerous that, if it malfunctions under ordinary use, the manufacturer will be held responsible for injuries and damages even if he is not at fault. Examples of inherently dangerous products would be dynamite and wild animals.

Objectives

After completing this chapter, the student should be able to define and discuss:

- What is meant by strict liability;
- The differences between strict liability and negligence;
- Why the strict liability theory was developed in products liability cases; and
- The five elements that must be proven in a strict liability case.

Introduction

The courts developed the **theory of strict liability** because they were dissatisfied with what they saw as a lack of sufficient protection for consumers by the warranty claims we studied when very dangerous products caused injuries. The courts began to rule that if a product is inherently dangerous, when used correctly, the consumer should not have to prove breach of warranty. Instead, the courts ruled that the manufacturer would be automatically liable for injuries caused by a very dangerous product. The student should be aware that legal scholars continue to debate the boundaries of the strict liability theory. Many are bothered by the idea of finding liability without fault. Other scholars argue further that the negligence theory is sufficient to protect the consumer.[44] 10 Toronto Law Review 130 1993–1994.

4.1 The Strict Liability Theory

A good place to begin our study is with the **definition of strict liability** provided by the legal scholars who published under the Restatement (Second) of Torts § 402A in 1965. (Remember that in Chapter One we learned about the **Restatements**.) It is this definition that formed the basis for today's large (and hotly debated) body of U.S. case law on strict liability.[45]

1. One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property **is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if**
   a) **the seller is engaged in the business of selling such a product and**
   b) **it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.** (*emphasis added*)

2. The rule stated in Subsection (1) applies although
   a) the seller has exercised all possible care in the preparation and sale of his product, and
   b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

By the mid-1970s, more than forty states had adopted the theory of strict liability in tort for defective products. As of 2005, only five states had formally rejected the doctrine of strict liability set out in Section 402A of the Second Restatement. These states are: Delaware, Massachusetts, Michigan, North Carolina and Virginia. However, these states essentially apply the principles outlined in Section 402A but they use the warranty and negligence law sections instead.[46]

The courts in those states that recognize the Second Restatement's strict liability doctrine, agree that **five elements must be proven** in a lawsuit that alleges strict product liability:

1. The sale of a product;
2. A defect in the product;
3. The defective product was the cause in fact and the proximate cause of the plaintiff's injuries;
4. The defect existed at the time the product left the defendant's hands; and
5. The product was manufactured or sold by the defendant.

It is important to remember that the strict liability theory still requires proof of the element of *proximate cause* that we saw in our study of negligence. The injury must be a reasonably foreseeable consequence of the defect in the product. However, in a strict liability case, *the care used by the manufacturer is irrelevant*. The manufactured product is so dangerous that the courts hold the maker liable for injuries due to defects regardless of the care used in designing or producing it. This is the main difference between negligence and strict liability.

One of the very first cases to hold manufacturers strictly liable in tort for defective products was a 1963 California decision, *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57 (1963).[47] The opinion was written by Justice Roger Traynor, an eminent jurist who spent 30 years on the California Supreme Court. In this case, the student can see the court's concern for the consumer and how warranty theories are not sufficient protection when dangerous tools are involved. The *Greenman* case had a strong impact on the courts as they began to uphold the strict liability theory in the product liability cases before them. Later court decisions described this opinion by Justice Traynor as the foundation for § 402A of the Restatement (Second) of Torts and as the foremost authority explaining the doctrine of strict liability.[48]

The Court Speaks

Figure 4.1 A defective lathe was the subject of the *Greenman* case

Greenman v. Yuba Power Products, Inc., State 377 P. 2d 897 (1962)[49]
(Note: Case quotations, below, are from the California State Reporter, 59 Cal. 2d 57)

Facts:

In this case, a defective power tool severely injured the plaintiff when it malfunctioned. Mr. Greenman received a Shopsmith, a combination power tool that could be used as a saw, drill and wood lathe, as a Christmas gift. Some time later he bought attachments to use the Shopsmith as a lathe to shape a large piece of wood into a chalice. At trial, Mr. Greenman testified that he read the warranties in the defendant's brochure. He described how he had worked on the piece of wood several times on the Shopsmith's lathe without difficulty. However, he was seriously injured when the wood suddenly flew out of the machine and struck him in the forehead. He sued the manufacturer for breach of warranties and negligence. The jury awarded him $65,000 damages, and the manufacturer appealed. The California Supreme Court unanimously affirmed the verdict in favor of the plaintiff.

Discussion:

The court's decision in this case explained the difference between liability for breach of warranties and the purpose behind the strict liability theory in a personal injury lawsuit. First, Justice Traynor said that Mr. Greenman did not have to establish a breach of express warranty because:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes an injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective.

Id. at 53 (citations omitted).

The decision then listed some of the products in this "variety," including insect spray, surgical pin, grinding wheel, automobile tire, air plane and hair dye.

In his decision, Justice Traynor also expressed concern that the warranties did not go far enough to legally protect Mr. Greenman. The court said:

> It should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do…. To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

Id. at 65

In referring to the defect in the machine as one "lurking beneath the surface," Justice Traynor explained that holding manufacturers strictly liable for defective products advances a public policy by "insur[ing] that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* at 64.

Questions:

1. What were the key facts in the *Greenman* case?
2. What did Justice Traynor say was the purpose for the strict liability theory?
3. What did the plaintiff in this case have to prove to establish strict liability?
4. Why did Justice Traynor rule that strict liability, and not the law of sales, should apply in this case?
5. Do the facts in this case meet the definition for strict liability in the *Restatement (Second) of Torts?*

At this point, you will want to remember what we noted in Chapter One about the Restatement (Third) of Torts: Products Liability that was published in 1998. Although the Third Restatement was an attempt to clarify the products liability section in the Second Restatement, most states continue to base their products liability law on the Second Restatement. This means that the courts in all but the five states listed above are still following the Restatement Second's definition of strict liability.[50]

4.2 Summary

In this chapter we reviewed the basic tenets of strict liability in a product liability lawsuit. You learned that there are five elements to establish a claim for damages based on strict liability. You learned that Justice Traynor ruled that a consumer who is injured by a defective product needs more than warranty protection. You learned that, unlike a negligence claim, strict liability focuses on product safety rather than any due care exercised by the manufacturer. And you learned that U.S. legal scholars attempted to clarify the law of strict liability in the Restatement Third of Torts but that the states and their courts still rely on the rules in the Second Restatement, which we reviewed.

4.3 Key Terms

Causation

A dangerous defect

Intended use of a product

Strict Liability

Substantial change

4.5 Chapter Discussion Questions

1. What are the five elements to be proved in a product lawsuit based on strict liability?
2. What role does due care have in a case based upon a strict liability theory?
3. Why did the California Supreme Court decide in the Greenman case that the common law protection of consumers from defective products needed to be expanded beyond sales warranties?
4. What was the "booby-trap for the unwary" in the *Greenman* case?
5. What public policy argument did Justice Traynor present to support the court's decision?

4.6 Test Your Learning

1. Which of the following is not part of the evidence in a product liability lawsuit based on strict liability?
   a) Damages
   b) Actual cause
   c) Reasonable care
   d) Proximate cause

2. Sunlit Manufacturing Company boxed and shipped snowblowers to several retail stores. Mr. Time bought a snowblower from his local hardware store during a sale. When he bought the machine it was sealed in the manufacturer's shipping box. When Mr. Time used the snowblower for the first time, a piece of metal framing flew out from under the machine and struck him in the left eye. Mr. Time lost his sight in that eye. If Mr. Time files a lawsuit on a theory of strict liability, what will he have to prove at trial?
   a) Sunlit Manufacturing Company manufactured and sold the defective snowblower; the snowblower was in its original sealed package when Mr. Time purchased it, and the defective snowblower was the cause of his eye injury
   b) The hardware store is liable for his injuries
   c) He used reasonable care when he took the snowblower out of the sealed shipping package
   d) Sunlit Manufacturing Company provided a warranty brochure with the snowblower

3. If the snowblower described in Question 2 was not in its sealed shipping container when Mr. Time bought it, which of the five necessary elements for a strict liability claim might Mr. Time have difficulty proving?
   a) Proximate cause
   b) Breach of warranties
   c) Sale of the defective product
   d) The defect in the snow blower existed when it left Sunlit Manufacturing Company

4. The focus of the strict liability theory is on which of the following?
   a) The due care exercised by the manufacturer
   b) The modern shipping packages used by the manufacturer
   c) The safety of the product
   d) The amount of damages that a consumer suffers

5. The strict liability theory was developed in product liability laws to provide increased protection to consumers from what?
   a) Unscrupulous product sellers
   b) Dangerously defective products
   c) Negligent manufacturers
   d) Their uninformed judgments

6. The *Greenman* case explained that strict liability first developed in what types of cases?
   a) Wild animals
   b) Unwholesome food products
   c) Machine manufacturing
   d) Dynamite

7. The theory of strict liability was developed because the courts found that which theories provided insufficient protection for consumers?
   a) Negligence theories
   b) Contract theories
   c) Warranty theories
   d) None of the above

8. How many U.S. states have adopted the strict liability doctrine outlined in the *Restatement (Second) of Torts*?
   a) 50
   b) 37
   c) None
   d) 45

9. In the *Greenman* case, Justice Traynor said it was sufficient that the plaintiff used the lathe:
   a) In a negligent manner
   b) In a dangerous way
   c) In the way it was intended to be used
   d) In a somewhat novel manner

10. The states that do not follow the strict liability theory outlined in the *Second Restatement,* do use what other theories from this *Restatement*?
    a) Negligence
    b) Breach of warranties
    c) Criminal conduct
    d) Warranty and Negligence

Test Your Learning Answers are located in Appendix A.

5 Legal Theories of Recovery in Product Liability: *Misrepresentation*

The theory of misrepresentation grew out of case law regarding damages caused by deceit. The theory of misrepresentation originally was applied in situations where a buyer lost money or property due to reliance on the false representations of the seller, but it is applied much more broadly today.

Misrepresentation, as a theory of liability in product liability actions, provides basis for liability on the part of a manufacturer or seller who has made false statements about a product. Unlike the theories of negligence, strict liability and warranty, this theory involves the intent, or mindset, of the manufacturer or seller as he deals with the consumer.

Objectives

After completing this chapter, the student should be able to:

- Define and discuss what is meant by misrepresentation;
- Define and discuss the differences among three types of misrepresentation: innocent, negligent and intentional; and
- Define and discuss the elements needed to support a claim based on each of the three categories of misrepresentation.

Introduction

In U.S. product liability law, three categories of actionable misrepresentation grew over time from the common law doctrine of deceit. These are: (1) **intentional misrepresentation,** (2) **negligent misrepresentation**, and (3) **innocent misrepresentation**. In this chapter, we will conduct a general review of these three theories. Because the law of product liability continues to evolve you should always remember to check the statutory and case law of the jurisdiction where a case is pending because individual states may prevent certain claims and theories under their respective statutes. In tort lawsuits, including those based on product liability, a plaintiff can allege more than one of the theories that we are studying in the complaint. Frequently, one set of facts supports more than one theory of liability. This process of alleging more than one theory one lawsuit is called **pleading in the alternative**. For example, the theories of misrepresentation we are about to study are often pled in the alternative with breach of warranty theories.

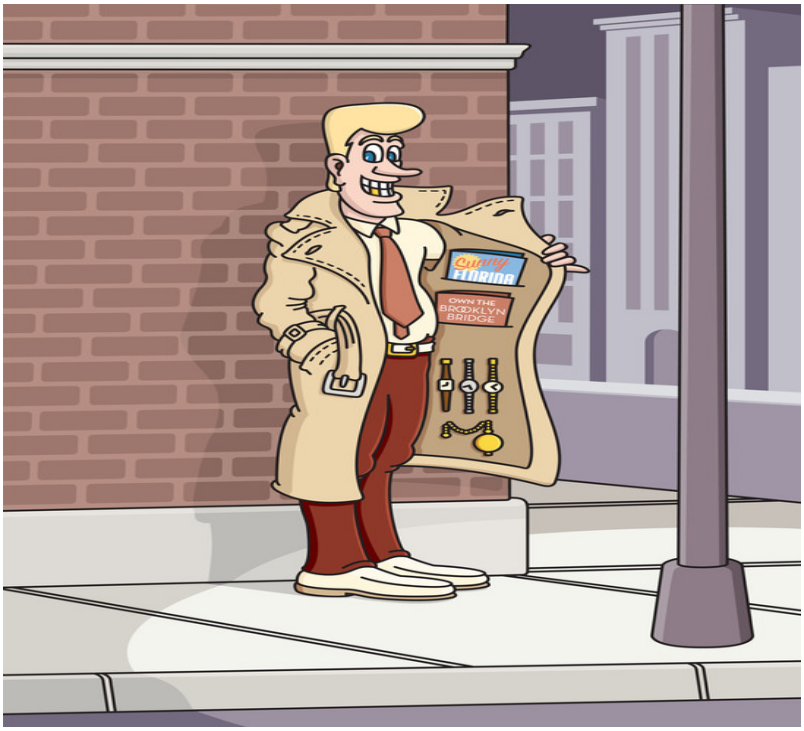

Figure 5.1 – Misrepresentation!

5.1 Intentional Misrepresentation

Intentional misrepresentation occurs when a manufacturer deliberately makes a false statement about a product to the consumer or intentionally conceals a fact from the consumer. (The tort of intentional misrepresentation is sometimes referred to as *fraudulent* misrepresentation.) Consider the case of Nut & Bolts, Inc., which sold a skid of bolts to a plaintiff home builder and told the builder that the bolts were made of steel. Unknown to the buyer, the seller wanted to clear his warehouse of old stock. When the builder opened the boxes of bolts on the job site and started to drill a bolt into a wall, the bolt shattered, severely damaging her face and eyes. She learned that the bolts were reconstituted steel that easily shattered, a fact the seller neglected to disclose. The manufacturer's intentional concealment of the true nature of the bolts would be considered misrepresentation. You can see that the facts in the Nuts & Bolts, Inc. case could also support a claim for breach of warranty and allow *pleading in the alternative* in any ensuing lawsuit.

Sometimes an *affirmative action* by a seller will be held to be a misrepresentation, such as when a seller turns back an odometer on a vehicle for sale.

To prove **intentional misrepresentation**, the plaintiff must be able to prove in court the following six **elements**:

1. The defendant made a material representation;
2. That the material misrepresentation was false;
3. The defendant knew the misrepresentation was false when he made it, or he made it recklessly, without any knowledge of its truth and stated the representation as a positive assertion;
4. The defendant made the misrepresentation intending for the plaintiff to act upon it;
5. The plaintiff relied on the misrepresentation; and
6. The plaintiff suffered injury as a result of the reliance.[51]

In product liability cases involving intentional misrepresentation, the courts frequently look at the relationship between the buyer and seller. The courts want to see if the seller has more knowledge than the purchaser about the product being sold. If so, the purchaser is entitled to rely on the seller's representations. For example, a farmer might rely on representations by the seller of a large combine that the combine can harvest the farmer's entire acreage of crops, yet the combine breaks down mid-harvest and much of the crop is lost due to weather. The seller was knowledgeable about combine performance. He knew that the combine model that he sold was inadequate for the farmer's needs, but he told the farmer the machine would do the job. The farmer made the purchase in reliance on the seller's statements and superior knowledge of the machine's capability. The seller would be liable to the farmer for the damages resulting from the loss of crops. The facts in the example support the theory of intentional misrepresentation.

In an intentional misrepresentation claim, we need to remember the element of *detrimental reliance* by the buyer must be proved at trial. (See: Element No. 5, above.) Without detrimental reliance on the part of the buyer, there cannot be a tort of intentional misrepresentation. For example, if a buyer does her own investigation of the product being sold to her and then relies on her own investigation into the quality of a product, she will have difficulty claiming that she *relied* on the seller's representations. In cases like this, where the buyer undertakes her own investigations into the product, the court may look instead to determine if the seller's representation was a *substantial fac*tor in the purchaser's reliance regardless of the buyer's own investigation. If the buyer *substantially relied* on the seller's bad information the seller, despite her own investigation, the seller may still be held liable for any ensuing damages. Today, claims for intentional misrepresentation may be brought against the defendant by anyone the defendant reasonably thinks will hear the misrepresentation.

The Court Speaks

*Oppenhuizen v. Wennersten,*139 N.W.2d 765 (1966)[52]

Facts:

This case concerns fraudulent misrepresentation in the resale of an automobile. Plaintiff purchased a used auto from Defendant Wennersten, who was in the business of repairing and re-selling cars. Mr. Wennersten purchased the car that he sold to plaintiff from Defendant Veneklasen, who was a co-defendant in this case. Veneklasen had sold the car with a forged title. (Veneklasen was convicted on a criminal charge in connection with being involved in a car theft ring.) The court found plaintiff entitled to both actual damages and exemplary damages. Both defendants appealed the judgments against them.

Discussion:

The appellate court upheld the damages against the initial car seller who had provided the fraudulent title to the salesman who then sold the car to plaintiff. You should take note that the ultimate consumer here is able, under the fraudulent misrepresentation theory, to successfully file a claim against the initial car seller. The court ruled that Defendant Veneklasen intended to represent to prospective purchaser, here the plaintiff, that the car title was valid. *Id.* at 769.

The court summarized the general rule regarding who can be held accountable for fraudulent misrepresentation by saying: "One who by fraudulent representation induces another to act to his damage is liable for the damages suffered…. A declaration from which it appears that the fraudulent representations of defendant were made for the purpose of inducing plaintiff to make a contract, and did induce him, indicate a sufficient connection on the defendant's part with plaintiff's loss to make him liable." *Id*. at 768–769.

This case also provides us with an example of how some jurisdictions allow exemplary damages in cases of intentional (fraudulent) misrepresentation. Here, the trial court's award of $500 in exemplary damages to the plaintiff was upheld. The court said: "'Malice as used in reference to exemplary damages is not simply the doing of an unlawful or injurious act; it implies that the act…was conceived in the spirit of mischief or of criminal indifference to civil obligations". *Id.* at 769 (citation omitted).

You should not confuse *punitive damages* with *exemplary damages*. Remember from our earlier discussion on damages that the purpose of punitive damages is to punish the defendant. By comparison, the focus of exemplary damages is on the plaintiff; with the goal of making the plaintiff as whole as possible. Exemplary damages "must not be oppressive, or such as shock the sense of fair-minded men…." *Id.* at 770 (citation omitted).

Figure 5.2 Misrepresentation!

Questions:

1. What were the key facts in the *Oppenhuizen* case?
2. How did the court describe the liability of the first seller of the car?
3. What is the difference between punitive and exemplary damages?

5.2 Negligent Misrepresentation

Like intentional or fraudulent misrepresentation, you will frequently see that negligent misrepresentation is pled *in the alternative* in many product liability lawsuits. Although negligent misrepresentation is described in the Restatement (Second) of Torts as a theory that primarily addresses lawsuits between individuals involved in business or professional relationships.[53] Attorneys do alternatively plead negligent misrepresentation in the more traditional product liability lawsuits. That is why it is important for us to consider here some of the theory's key concepts.

The theory of negligent misrepresentation combines the legal theories behind both negligence and misrepresentation. Remember from our studies in Chapter Two, that negligence involves the four important elements of duty, breach, causation and damages. In a *negligent misrepresentation* case, a duty must be established between the plaintiff and defendant. This duty typically exists between a plaintiff and a defendant having a business, employment or professional relationship. This is why there are, for example, many lawsuits filed on the theory of negligent misrepresentation by investors against investment brokers and between buyers and sellers of homes.

Lawsuits against drug manufacturers provide examples of claims involving the theory of negligent misrepresentation. If you read the case of *Germain v. Teva Pharmaceuticals, USA, Inc.,* 758 F.3d 917 (6th Cir. 2014)[54], a consolidate multi-district products liability case, you can see how one federal court recently analyzed negligent misrepresentation in ruling against plaintiffs in their class action lawsuit against generic drug manufacturers.

The **elements of negligent misrepresentation** are identical to the six for intentional misrepresentation that we reviewed in Section 5.1, above, for intentional misrepresentation. A main difference between intentional misrepresentation and negligent misrepresentation is that the defendant may not know that the actual statement is false at the time that it is made. The plaintiff must prove that the manufacturer *had the duty* to know the misrepresentation. The plaintiff must also be sure to prove that she *detrimentally relied* on the misrepresentation and suffered injury as a result. You should note here the interplay between the theories of negligence and misrepresentation.

5.3 Innocent Misrepresentation

A few comments are in order about the theory known as innocent misrepresentation. This theory one that is also frequently *pled in the alternative* in a civil complaint that arises out of damages a plaintiff suffers as a result of her reliance on a seller's statements during a sales transaction. Innocent misrepresentation is a relatively modern claim in U.S. product liability law. A definition of **innocent misrepresentation** is: a representation made in good faith and believed to be true by the one making it but that is in fact false. //dictionary.findlaw.com) The key focus of the innocent misrepresentation theory is that it does not matter if the misrepresentations were made in good faith. What does matter is that the person who is deceived suffers a loss that benefits the person making the statement.

The **elements** for **innocent misrepresentation** in the state of Michigan are helpful as an example to us here. In order to succeed on a claim of innocent misrepresentation, plaintiffs must prove the following:

1. The defendant made a representation of a material fact; not a mere omission(s);
2. The representation was made in connection with the making of a contract between plaintiffs and defendants;
3. The representation was false when made;
4. Plaintiffs would not have entered the contract if defendant had not made the representation;
5. Plaintiff had a loss as a result of the contract; and
6. Plaintiff's loss benefitted the defendants.

Havener v. Richardson, 16 F. Supp. 2d 774.[55]

As U.S. manufacturing and distribution of potentially hazardous products such as drugs grew, liability for innocent misrepresentation was specifically extended to the sellers of such potentially hazardous products. The courts are aware that consumers are inundated daily with advertisements for products. Think for a moment of all the advertisements seen on television and heard on the radio. Consequently, liability for innocent misrepresentation by product sellers has expanded to protect consumers. You will want to remember that the new *Restatement (Third) of Torts: Product Liability* (1998) treats strict liability drug cases differently than in the past by assigning strict liability to innocent misrepresentation if certain facts are present. There does not have to be negligence or fraud involved in the seller's advertising, labels or statements for strict liability to attached. The prior Restatement Second § 402B supported liability against a seller makes an innocent misrepresentation about its product to the public and the consumer justifiably relies on the misstatement and suffers personal injury, liability may attach to the product seller. *Restatement (Second) of Torts* § 402B (1965)

5.4 Puffing

Before we leave the legal theory of misrepresentation, it is important for us to understand that the law permits statements to be made about a product or its qualities that reasonable people would understand to be simple opinion. In our everyday world, we consumers frequently see advertisements or a salesperson *puffing up* a product's good points. We must remember that this type of *sales talk* or *sales speak* is usually not the basis for a claim of misrepresentation. The difference to remember is that **puffing** is someone's opinion about a product. In contrast, misrepresentation involves an incorrect statement given or presented as a fact. For example, consider a seller of marine rope telling a boater, "I think that this rope will hold just about any size boat to the dock." The boat owner should understand that this is the seller's opinion and is mere puffing. However, if the marine rope seller says, "This rope has been proven to hold every size boat to a dock, according to recent tests by a national safety organization," the seller likely has gone beyond puffing and is now stating a fact. If the fact is wrong, and there never was any testing by a safety organization, the seller could be liable for misrepresentation if the boat is lost in a storm after the rope holding to the dock breaks.

5.5 Summary

In this chapter, you learned that both manufacturers and sellers can be found liable for fraudulent and negligent misrepresentation. You learned that the four elements that must be proven in an intentional (fraudulent) misrepresentation case are the: (1) an intentional statement or representation made by the seller about the product to induce a sale, (2) the seller knows the representation is false, (3) detrimental reliance by the consumer on the seller's misrepresentation, and (4) the consumer suffers damages or injury. You learned that the elements for negligent misreprenstaiton are the same as those for intentional misrepresentation. However, you also learned that there is a key difference between the intentional and negligent misrepresentation theories. Claims. In an intentional misrepresentation claim the defendant knows his statements or actions are false. In negligent misrepresentation, the defendant may not know that the statements are false but is said to have *a duty* to have known or found out the true information. You also learned that the Third Restatement has expanded the doctrine of innocent misrepresentation to allow a consumer to sue in strict liability for innocent misrepresentation involving drugs if the consumer is injured by a product because she detrimentally relied on the misrepresentation in the public advertisement or on the label.

5.6 Key Terms

Exemplary damages

Innocent misrepresentation

Intentional misrepresentation

Negligent misrepresentation

Pleading in the alternative

Puffing

5.7 Chapter Discussion Questions

1. What societal changes prompted the courts to begin to begin to allow claims based on innocent misrepresentation?
2. Provide an example of pleading in the alternative.
3. What is meant by intentional misrepresentation?
4. What is meant by negligent misrepresentation?
5. What is the key difference between intentional and negligent misrepresentation?
6. What is the key difference between negligent misrepresentation and innocent misrepresentation?

5.8 Test Your Learning

1. What are the four elements needed for fraudulent misrepresentation?
   a) (1) defendant's representation, (2) defendant knows the representation is false, (3) plaintiff relies on the misrepresentation to her detriment, and (4) plaintiff suffers damages or injury
   b) (1) defendant's representation, (2) defendant knows the representation is false, (3) plaintiff relies on the misrepresentation to her detriment, and (4) plaintiff does not suffer damages
   c) (1) defendant's representation, (2) plaintiff knows the representation is false, (3) plaintiff relies on the misrepresentation, (4) plaintiff suffers damages

2. What is the definition of exemplary damages?
   a) Damages intended to punish the defendant's wrongdoing
   b) Damages intended to make the plaintiff as whole as possible
   c) Damages intended to overcompensate the plaintiff
   d) None of the above

3. Do the *Restatement* scholars support a claim for innocent misrepresentation?
   a) Yes
   b) No
   c) Yes, but it is limited to claims against sellers of products
   d) None of the above

4. Pleading *in the alternative* allows a plaintiff to:
   a) Allege more than one cause of action against a defendant
   b) File a civil and criminal complaint together for damages
   c) Seek alternative damages
   d) File the same lawsuit on a Monday and again on a Tuesday

5. Which of the following is an example of *puffing*?
   a) Drink milk for strong bones
   b) This headache remedy will relieve your headache
   c) We sell the best cars in the entire universe
   d) Read the instructions before using this product

6. What is usually the essential difference between intentional misrepresentation and negligent misrepresentation?
   a) The professional relationship between the buyer and seller
   b) There is no difference
   c) The seller's state of mind and intent to defraud
   d) There are no damages

7. The key difference between negligent misrepresentation and innocent misrepresentation is:
   a) There isn't any difference
   b) The defendant makes an affirmative representation without any malice and benefits from the transaction while the plaintiff loses from the transaction
   c) A seller's fraud is involved with innocent misrepresentation and not with negligent misrepresentation
   d) None of the above

8. *Puffing* is also known as:
   a) Fraud
   b) Negligence
   c) Detrimental reliance
   d) *Sales speak*

9. The main difference between puffing and misrepresentation is:
   a) Puffing is someone's opinion and misrepresentation is an incorrect statement given as fact
   b) There is no difference
   c) Puffing is never used by the seller of automobiles
   d) None of the above

10. A key area of debate among scholars, involving the definition of strict liability in the Second and Third Restatements of Tort, centers on what products?
    a) Prescription drugs
    b) Automobile tires
    c) Food products
    d) Used automobiles

Test Your Learning Answers are located in Appendix A.

6 Defenses to Product Liability Lawsuits

In the previous chapters, we explored the legal theories used by the plaintiff/consumer when a products liability lawsuit is filed in a court. As students of the law, you must remember that there are always two sides to the lawsuit story. In this chapter, we will discuss the defenses that are typically raised by the defendant in a product liability lawsuit. Defenses in product liability lawsuits can be complex. This chapter is designed to present a preliminary understanding of possible defenses, which will provide a basis for you to develop a greater understanding of these defenses through further study.

Objectives

After completing this chapter, you should be able to identify, define, discuss and explain:

- The defense of comparative negligence or fault;
- The defense of assumption of risk;
- The state-of-the-art defense; and
- What is meant by the statute of limitations defense.

Introduction

Manufacturers and sellers of products understand that the best way to avoid liability is for an organization to exercise appropriate care at all times during the design, manufacturing and sale of a product. However, beyond careful planning at all phases of these processes, there are also legal defenses to product liability lawsuits. A **defense** is the legal theory presented by the defendant to refute the claim that the plaintiff's injuries were the result of anything the defendant did or failed to do.

In our study here, we will now review four such defenses: (1) comparative negligence or fault, (2) assumption of risk, (3) state-of-the art, and (4) the statute of limitations. The common law in the U.S. developed two primary defenses to product liability lawsuits, *comparative negligence* and *assumption of risk*. As the name implies, the fourth defense, *statute of limitations*, is statutory and defines the absolute deadline for a lawsuit to be brought in court. Let us begin now with the traditional common law defense of comparative negligence.

6.1 The Comparative Negligence Defense

The defense of comparative negligence is also referred to as the defense of *comparative fault.*

As product liability claims expanded in the U.S., the courts were acutely aware of a balancing process that must occur when addressing how to fairly assess who would be liable given a particular set of facts. The courts also realized that the business of product manufacturing had to continue to support a growing economy. Legal liability had to have a sound basis in fairness to protect both the manufacturer and the consumer. The **defense of comparative negligence or comparative fault** requires the negligence of each party in the lawsuit – both the plaintiff and the defendant – to be assessed to determine if plaintiff's injuries were attributable, in whole or in part, to the plaintiff's own conduct. One legal scholar describes comparative negligence as "the courts opting for the apparent justice of making each party to the accident bear responsibility for the losses attributable to that party's breach of good behavior."[56]

As we have seen many times in our review of product liability law, we must always research the law of a particular state to determine if the defense of comparative negligence is used in that jurisdiction. And, you will want to go beyond this initial question to understand how the courts of the state apply this defense. In particular, comparative negligence will not be a defense in a strict liability case if a plaintiff did not have the opportunity or capacity to find out about a defect and protect herself from it.

One theory of comparative negligence, sometimes called *pure comparative negligence*, means that a defendant is required to pay exactly that percentage of the damages that the defendant is found to be responsible for; for example, if a defendant is found by the court to be 50% at fault and the plaintiff 50%, the defendant would pay 50% of the total damages awarded by the jury. Under another theory, called *partial comparative negligence,* the plaintiff recovers a percentage of the total damage award but only if the defendant is found to be more at fault than the plaintiff. Thus, if the plaintiff is found to be 51% or more at fault, she may not receive anything for her injuries despite the fact that the defendant was also at fault.

As we can see, comparative negligence can end up being a complicated formula for a jury to work out. We can see the jury at work on determining a comparative negligence formula in the following case. (Figure 6.1 is a picture of a cultivator, with hydraulic lifts on the wings, which are in the *down* position. In the *Patton* case below, the wings were in the *up* position and fell on the plaintiff.)

The Court Speaks

Patton v. TIC United Corp., 77 F.3d 1235 (10th Cir. 1996)[57]

Figure 6.1.1 A winged-cultivator with wings down

Facts:

Although this case is presented to demonstrate how a jury formulates a verdict based on a comparative fault formula, the case also demonstrates several interesting facets of a product liability lawsuit that we have reviewed so far in our study. You should first observe the legal *theory* underlying the lawsuit, which was the theory of negligent failure to warn of a design defect. You will then want to note that the case was *brought under the laws of the state of Kansas*, which allowed the plaintiff to sue not just the current owner of the company that manufactured the defective machine, TIC United Corp. (TIC), but also to sue various predecessors of TIC. The point here is to remember that the specific state law must be reviewed to ensurethe complaint is accurately drafted.

Also of interest is that all defendants except TIC settled with the plaintiff before trial. A substantial verdict was returned against TIC. However, in determining the amount of this verdict against TIC, the jury used a comparative fault formula allowed under Kansas law and assessed some fault against those defendants who were no longer part of the lawsuit at trial because they had settled. The court also assessed fault against the plaintiff and his father, who had purchased the machine. (**Note**: The term used by trial attorneys for the situation that exists when a defendant settles and does not have its attorney at the counsel table at trial is *the empty chair.* Although there is not literally an empty chair on the defendants' side of the table, a co-defendant will frequently refer to the absent defendant (the empty chair) and point the finger of liability at this defendant in front of the jury. This situation clearly occurred in the *Patton* case because the jury assessed fault against the defendants who settled with the plaintiff and were not at trial.)

Let us now consider the specific facts of the accident. Ryan Patton was raised on his family's farm in Hiawatha, Kansas. His father purchased a vertical wing cultivator from defendant Wil-Rich in 1977. (Wil-Rich was sold to Lear Siegler and then again to Defendant TIC, which owned the manufacturing company at the time of the lawsuit.) Both Lear Siegler and TIC were named as defendants. The cultivator was 23 feet wide and had two 8-foot-long wings that could be lifted to a 90-degree angle and locked in position for ease of transport or storage. The wings would be lowered for use. A hydraulic system would be used to lift, lower or steady the wings. Manually inserted safety pins would lock the wings in an upright position. When the pins were removed, the full hydraulic pressure alone would keep the 2000-pound wings erect.

When first attached, a new hydraulic cylinder would not be charged. To insure that the cylinder would support a wing, the operator would need to cycle the machine to make sure that the hydraulic system was fully charged before removing the safety pin. However, the operating instructions did not state how to ensure that the hydraulic system was properly charged and did not warn that the wings should not be in an upright position when replacing the cylinder. The only warning on the machine about the hydraulic wings said, "Pull wing pins before lowering wings." *Id.* at 1240.

Ryan Patton was changing the hydraulic cylinder on the cultivator. He retracted the wings to make sure the wings were fully raised. He pulled the hydraulic lever several times to fully charge it. Unaware that the cylinder was not fully charged, Ryan walked under the wing, pushed it up and removed the safety pin, thinking the arm was fully charged and the hydraulic wing would hold. It did not. Ryan had no way of knowing that the hydraulic arm was not fully charged. The wing fell and crushed Ryan, severing his spine.

Discussion:

In describing the theory used successfully by plaintiff, the court said the "original design was defective because it encouraged operators to stand under the cultivator wing when they removed the safety pin, making it likely that they would be severely injured in the event of hydraulic failure." *Id.* at 1240. Below is a chart showing how the jury assessed fault against Defendant TIC and its various predecessors: Note that the jury assessed some fault against the plaintiff and against his father, who originally purchased the machine.

Figure 6.1.2 The chart shows the verdict in the *Patton* case, in which the jury weighed all parties' conduct in assessing damages under the *comparative negligence theory.*[58]

Plaintiff	Defendant	% of Fault Assessed by Jury
Ryan		2%
(Ryan's father)		2-½%
	Lear Siegler	18-½%
	TIC	76%
	Prior, short-term owner of TIC	1% **100%**

Jury deliberations in this case must have been most interesting as the jurors talked and deliberated about how to assign fault among the defendants and the plaintiff.

Questions:

1. What was the legal theory used by the plaintiff in the *Patton* case?
2. Why do you think that the jury in the *Patton* case assessed some fault against Plaintiff Patton himself?
3. What was the significance of Kansas state law in this case?
4. Which defendants occupied the empty chairs in the *Patton* case?

6.2 The Assumption of Risk Defense

6.2.1 *Assumption of Risk* – bungee jumping

Let us now spend some time discussing the second traditional defense in product liability lawsuits, assumption of risk. Generally, the **assumption of risk defense** means that a defendant is not liable for a plaintiff's injuries if the plaintiff uses a product voluntarily, knowing that it is dangerous, and thus exposes herself to the danger that creates her injury. Stated another way, the plaintiff by her actions relieves the defendant of any liability. Assumption of risk can serve as a total bar to a plaintiff's recovery. Some courts will allow damages despite an assumption of risk defense, if the jury finds that the plaintiff's conduct was reasonable under the circumstances.

Assumption of risk is what is termed an *affirmative defense* in many jurisdictions. **Affirmative defense** means that if a defendant establishes the defense through evidence at trial, the defense serves as a complete bar to plaintiff's recovery. The statute of limitations, which we will explore below, is another example of an affirmative defense. Affirmative defenses are very important to for manufacturers defending a product liability lawsuit. These defenses are given such serious legal status that, in many jurisdictions, if an affirmative defense is not specifically pled in the defendant's Answer to the Complaint, the defendant is barred from raising the defense at trial.

Courts, maintaining an attitude of abundant fairness, are not going to allow an injured plaintiff to recover damages resulting from a product defect if the plaintiff both understands the risk and then proceeds to her detriment – for example, let's say a plaintiff decides to engage in bungee jumping and waits her turn in a long line of enthusiastic risk-takers. She knows that many jumpers have already used the bungee lines that day, and she knows she is far above the ground. If a line holding her would break and she would plunge to the net below, severely fracturing her leg and hip in the fall, courts might deny liability against the bungee apparatus owner citing the assumption of risk defense. Many jurisdictions have statutes that protect business owners from liability for injuries from many types of sporting activities where the risks are generally known, such as skiing.

6.3 The State-of-the Art Defense

The term *state-of-the-art* is tightly interwoven in the trial of most product liability cases because much of the trial can focus on what was *the cause* of the defect in the product. Simply stated, the **state-of-the-art** defense questions whether or not the most modern or up-to-date knowledge or science available was used in the product's manufacture. Two cases from the state of Maryland present good examples of how these courts defined the defense of state-of-the art: (1) "State of the art includes scientific, medical, engineering and any other knowledge that may be available," and (2) "State of the art evidence includes not only discoveries by the general scientific community or discoveries reflected in the general scientific literature, but also the discoveries by scientists or experts employed by other manufacturers.[59]

One legal scholar summarized the state-of-the- art defense this way: "Most judicial opinions define the *state-of-the-art defense* in terms of feasible safety. One state, for example, defines the defense as 'the best technology reasonably available at the time.' …The defect that the plaintiff claims injured her could not have been designed or warned against. (citations omitted).[60]

This defense is used in product liability cases based upon negligence because in the negligence case the court and jury are examining the conduct of the manufacturer. The state-of-the-art defense involves a balancing. The courts weigh what would be the *reasonable cost* to the defendant for including the available scientific knowledge into the production of its product against the level of potential risk of harm to the public if the latest science is not included in the product. The courts do not require a manufacturer to approach bankruptcy status by using the most modern scientific knowledge if there is a reasonable, less-expensive alternative that can be used in the manufacturing process to eliminate a defect. The student should note that the state-of-the-art defense is *not available* to a defendant in a lawsuit based upon strict liability. The reason for this is that the case for strict liability focuses on the ultra-hazardous nature of the product itself. Manufacturers can be held strictly liable for injuries in strict liability because of the risky nature of the product, such as dynamite. The conduct of the manufacturer is not assessed.

Let us consider a lawsuit in which the state-of-the art defense is raised. Assume that Plaintiff Martha Smith had a hip replacement in the year 2014. Her new artificial hip was made by the Hipster Corporation and used a grade of steel that was commonly used for artificial hips between 2000 and 2007. Good results were reported from this product. However, Mrs. Smith had problems with her new hip immediately after her replacement surgery.

Now consider that, due to rapidly advancing science, a new artificial hip, made of refined titanium by the Super Hipster Company, was introduced in the medical market. Starting in 2008, this new hip was available for use to patients such as Mrs. Smith. The surgical results of this new titanium hip surpassed the one used in Mrs. Smith's surgery. The new titanium hip is $10,000.00 more expensive than the hip used for Mrs. Smith.

An example of the arguments, when a state-of-the art defense is presented, can be seen below.

Plaintiff Argues that:	Defendant Argues that:
The defendant failed to use or rely upon the most up-to-date knowledge in the field when manufacturing its product. The defendant should have used the new titanium hip.	*The defendant used the best technology that it could in manufacturing an affordable hip for patients.*
Therefore, the defendant was negligent.	*The state-of-the art technology that the plaintiff argues that the defendant should have used was unreasonably expensive. Therefore, the defendant did not have to use the most modern techniques available. The defendant used what was reasonable, at the time of manufacture.*

6.3.1 A *State of the Art* Argument before the Jury at a Trial

The law on the state-of-the-art defense is far from settled in the U.S. Courts. Thus, this defense continues to evolve as science and technology evolve. Some states define the state-of-the-art defense in their statutes, while other states leave the definition to evolve through their court decisions. In some states, state-of-the-art has risen to the level of an affirmative defense.[61]

Let us now turn to the defense that is an absolute defense in product liability cases.

6.4 The Statute of Limitations Defense

6.4 Time is of the essence in *the statute of limitations defense*

As we have seen, our study of law involves understanding court decisions and remembering the rules set by state statutes. Each jurisdiction has statutes that establish deadlines for filing lawsuits, including product liability lawsuits. These laws are called **statutes of limitation.** A **statute of limitation** sets the maximum period of time allowed for filing a lawsuit after the occurrence of the event that is the subject of the lawsuit. If the plaintiff misses the deadline for filing a case, the plaintiff is out of luck and out of court. There is no recourse with this defense, and a plaintiff is unable to ask the court for a longer period of time, even if it is only one day. The statue of limitations is an absolute affirmative defense. The idea behind these deadlines could be described as *legally practical.*

The reasons for applying a deadline to the filing of a lawsuit include: (1) evidence can be lost after time, (2) the memories of witnesses fade, and (3) simple fairness suggests that a defendant should not have to wait an indefinite period of time anticipating a lawsuit after an injurious incident occurs to a consumer. For example, if someone was injured in 2014 when a defective coffee maker exploded when it was full of hot coffee, a statute of limitation, such as three years, allows the plaintiff time to file a lawsuit when design drawings and manufacturer's records would likely still be available. However, if there was no statute of limitation, the manufacturer may dispose of records after seven years. It would be unfair to ask product manufacturers to retain records forever. And, the primary product designer may have retired or died and is no longer available to explain the product design. A reasonable time to pursue a product liability lawsuit, or be forever barred from doing so, seems a reasonable compromise for all involved.

6.4.1 The Tolling of a Statute of Limitations

In some cases, a statue of limitations may be **tolled.** The **tolling of a statute of limitations** means that the time limit is legally extended when certain conditions exist. For example, if the injured potential plaintiff is a minor, the statute would be tolled, or suspended, until the minor reaches the age of majority. This period of time that the time limit is delayed is called **the tolling period**. Once the minor reaches the age of majority, the tolling period ends and the statutory time period begins to run. State laws differ on the age of majority. Another illustration of the tolling of the statute of limitations is seen in product liability lawsuits involving injury from a disease. Sometimes there can be a time delay between when a prospective plaintiff is exposed to a defective product and when the plaintiff becomes ill from that exposure. This time period is called the **latency period** for the disease, and it can be months or even years. A statue of imitations can be tolled (stopped) until there is evidence of health damage from the disease. If this tolling concept was absent, incongruous results could occur, because a plaintiff could be forced to file a lawsuit without any damages and without even knowing she was ill.

An individual state's statutes and case law must be studied to understand how disease latency periods are measured. Suffice it to say here that many arguments are raised in latent disease cases about when the plaintiff *knew or should have known* that her illness was related to a specific product. In doing further research on the statute of limitations defense in latent disease cases, you will find case law dealing with lawsuits from exposure to asbestos-containing products to be particularly instructive. This is because there is always a time delay (*an incubation period*) for an asbestos disease to develop after exposure to asbestos dust. The asbestos lawsuits we will discuss in Chapter Seven involved workers exposed to asbestos dust during the 1950s. Generally, these workers did not develop an asbestos-related disease until many years after they breathed the dust. Many were already retired.

Before we leave this discussion of statutes of limitations defenses, you should be aware of one final legal rule called a **statute of repose**. Some states impose a **statute of repose** in product liability lawsuits that involve latent diseases. A **statute of repose** establishes an absolute outside time limit after which a lawsuit may not be filed. For example, assume that a worker was exposed to asbestos 10 years before he became ill in a state with a three-year statute of limitations for the filing of a product liability lawsuit. Assume further that the worker wanted to file a product liability lawsuit for damages to his health resulting from the asbestos disease, claiming that the asbestos manufacturer negligently failed to warn of the hazards of asbestos. If the three-year statue of limitations in this worker's state included a statute of repose of seven years, measured from the date of first exposure to the manifestation of illness, this worker would have to file his lawsuit within seven years from the date of his exposure to the asbestors, even if he did not get sick for 10 years.

6.5 Summary

In this chapter you learned about the four defenses customarily raised in product liability lawsuits: (1) comparative negligence or fault (2) assumption of risk (3) state-of-the-art and (4) the statute of limitations. You saw an example of how a jury compared the negligence of the plaintiff and the defendants in the *Patton* case. You learned what is meant by an affirmative defense and how assumption of risk is such a defense. You learned the meaning of a statute of limitations and you also learned what is meant by a statute of repose. You also learned about the application of the statute of limitations in what are called latent disease cases.

6.6 Key Terms

A defense

Affirmative defense

Assumption of risk

A statute of limitations

A statute of repose

Comparative negligence

Latency period

State-of-the-art

The empty chair

Tolling

6.7 Chapter Discussion Questions

1. What is meant by the term defense in a product liability lawsuit?
2. What is meant by the term affirmative defense?
3. What are the four defenses commonly raised in products liability lawsuits?
4. What is meant by the term assumption of risk?
5. What is meant by the term statute of repose?
6. What is meant by the term a statute of limitations?
7. What is another term for the defense of comparative negligence?
8. What does it mean if a statue of limitations is tolled?
9. Why did the jury assess the negligence of both the plaintiff and the defendants in the *Patton* case?
10. What is meant by the term state-of-the-art?
11. What must be balanced by the jury when applying the state-of-the-art defense?

6.8 Test Your Learning

1. A statute in the state of Michigan provides that a product liability lawsuit must be filed by the plaintiff within three (3) years from the date of the plaintiff's injury. If this deadline is not met, the plaintiff will be barred from filing a lawsuit. What defense is illustrated by this scenario?
   a) An affirmative defense
   b) A state-of-the-art defense
   c) A statute of limitations defense
   d) The assumption of risk
   e) Both "A" and "C"

2. A products liability trial was commenced against Defendant Auto Tire Co., Inc. Plaintiff alleged that defendant was negligent because the company did not use the most recent scientific formula in manufacturing its rubber tires. The defendant argued that the most recent formula was too expensive and it used a reasonable alternative to the most recent formula. This scenario would be an example of what defense to a product liability lawsuit?
   a) Statute of limitations
   b) Assumption of risk
   c) State-of-the-art
   d) The most recent science defense

3. What defense did the jury in the *Patton* case analyze?
   a) State-of-the-art
   b) Statute of limitations
   c) Comparative negligence
   d) Bungee jumping

4. All but one of the defendants settled before trial in the *Patto*n case. What term describes the fact that only one defendant was in the courtroom for trial and the others were absent?
   a) The empty chair
   b) The lunch break
   c) Absolute defense
   d) Statute of limitations

5. Which of the following are two studied reasons supporting a statute of limitations defense?
   a) Time passes quickly
   b) Evidence can be lost and memories of witnesses can fade over time
   c) The early bird catches the worm
   d) The clock and the calendar

6. Which of the following best defines the term statute of repose?
   a) A time limit for filing a product liability lawsuit
   b) An absolute deadline after which a plaintiff is barred from filing a product liability lawsuit against a defendant
   c) There is a need for more relaxation in the law
   d) None of the above

7. Which of the following gives the best example of when a statute of limitations may be tolled?
   a) The case evidence was lost
   b) The plaintiff is now dead
   c) The prospective plaintiff is a minor
   d) Too much time has passed since the injury occurred

8. The state-of-the-art defense involves a balancing of which of the following:
   a) Recent science, research and the cost of its implementation
   b) Very expensive research and high costs
   c) The least expensive way to make a product
   d) The most expensive way to make a product

9. Which of the following is the correct term used to describe the time it takes for a disease to develop in a person after the exposure to a dangerous product, such as asbestos?
   a) The tolling time
   b) The statute of limitations
   c) The one-month time limit
   d) The latency period

10. The defense of comparative negligence is also referred to as:
   a) The defense of comparative fault
   b) The defense of time limits
   c) The defense of assumption of risk
   d) None of the above

7 U.S. Product Liability Law Today

As we begin Chapter Seven, the final chapter in our studies, let us take a moment to review the overall development of product liability law. This brief look back will enhance our understanding of how the law is being written today and how it will be crafted in the future by both the U.S. courts and legislatures.

Objectives

After completing this chapter, you should be able to:

- Explain what is meant by the term *mass-tort litigation;*
- *Discuss and define what is meant by the term multi-district litigation;*
- *Explain the historical development of procedures used by the courts to handle mass tort litigation;*
- *Discuss and explain what is meant by the term tort reform;*
- *Trace the history of product liability law from the elimination of privity to today's mass-tort litigation; and*
- *Understand how national safety standards are part of the law that that manufacturers must follow in making their products.*

7.1 A Summary: From the Elimination of Privity to Mass-Tort Litigation

In Chapter One, we started by our discussion with how the developing needs of U.S. society, during the Industrial Revolution in the U.S., presented continuous challenges to the courts. The courts saw cases before them involving new and different products causing injuries. They tried to craft their rulings to fairly compensate a growing number of victims injured by these new defective products. We reviewed some of the historic cases, from the elimination of the privity requirement in the *MacPherson* case to the Hand formula developed in the *Pfalsgraf* case These decisions showcased the results of the U.S. courts' struggle to compensate injured victims while simultaneously factoring into the balance the manufacturers' need to be able to develop and produce their products.

We have learned about how several theories of liability were developed and what defenses can be raised to these theories. Lawsuits against automobile manufacturers, such as the Ford Pinto (*Grimshaw)* case and the *Heningsen* crashworthiness case, showed us how the courts continued to apply this balancing test if someone was injured, as manufacturers produced more and more sophisticated products for public consumption. In our discussions we were reminded that we must always check federal and state statutory law, in addition to court decisions, in any thorough research project on U.S. product liability law. Some federal statutes that have developed and are regularly updated by the U.S. Congress to provide consumer protections include: (1) The Motor Vehicle Safety Act (MVSA), 49 U.S.C. §301, *et. seq*., (2) The Food Safety Modernization Act (FSMA)], 21 U.S.C.§301, *et. seq*., and (3) the Consumer Product Safety Act (CPSA), 15 U.S.C §2015, *et. seq*.[62]

If you research the MVSA, for example, the research will take you to the Motor Vehicle Safety Regulations. (**Regulations** are the rules written by a government agency responsible for enforcing a particular statute to assist in implementing the statute. The agency has been created by statute to write and enforce these regulations, which are *primary authority* in our research.) The student will see that these MVSA Regulations or Standards, issued by the National Highway Traffic Safety Administration (NHTSA), set forth the safety manufacturing rules with which the auto manufacturers must comply. Of note is that these regulations involve the same car parts that were involved in the case law we studied. For example, there are safety standards for windshields (the *Baxter* case); steering mechanisms (the *Henningsen* case); fuel system integrity and rear-impact protection (Ford Pinto/*Grimshaw* case); car tires (the *MacPherson* case) and ignitions (the *Melton* case.).

Many of these standards were written with certain past lawsuits in mind. And some of the product liability lawsuits brought today against manufacturers claim that the manufacturers *failed to follow the mandated manufacturing standards.* We will see this exemplified in our upcoming discussion of the GM ignition switch cases.

Lawsuits against major product manufacturers, such as auto companies and asbestos-product manufacturers, continue to provide a forum for the development of today's U.S. product liability law. Today, if a defect is discovered in a manufacturer's product and that defect causes injuries, the result is frequently the filing of numerous lawsuits against the manufacturer. More and more law firms use *class action* procedures in representing plaintiffs against the manufacturers. In response to mass filings, the courts and legislatures remain determined to manage the growing numbers of lawsuits and have developed and expanded the existing *procedures* for so doing. In this chapter, we will examine a few of these procedures, including the *procedures* for **multi-district litigation and class action lawsuits**, which have become major vehicles for the management of the explosion of product liability lawsuits against certain manufacturers. In addition to reviewing these lawsuit management procedures, we will also discuss the concept of **tort reform**.

7.2 Mass Tort Litigation

A feature of modern U.S. product liability law has been the development of *mass tort litigation.* The term **mass tort litigation** means the filing of lawsuits by many individual plaintiffs against a manufacturer or manufacturers that made the same type of defective product(s) that caused personal injury to the plaintiffs. Beginning in the late 1960s, hundreds if not thousands of lawsuits, many of them product liability lawsuits, were filed in state and federal trial courts. (The **federal district courts** are the trial courts in the federal system.) Consider for a moment the tremendous burden these mass filings placed on the court systems. This mass filing situation forced the courts to develop new procedural systems, based on existing court rules, to manage dockets of hundreds of cases with similar fact and/or legal issues. A good example of mass tort litigation can be seen in the product liability lawsuits filed against asbestos-product manufacturers. Beginning in the early 1970s, lawsuits were filed by hundreds of thousands of individuals in the U.S. who alleged that they became sick as a result of their work exposure to various products containing asbestos dust. In many cases, these workers died from asbestos-related lung cancer. The individual product liability lawsuits were brought against multiple companies that manufactured asbestos-containing products, such as pipe covering and insulation. The legal theories for these lawsuits included those that we studied earlier: breach of warranties, strict liability and negligence.

These asbestos-related lawsuits constituted the largest mass tort litigation in the history of the U.S.[63]

Figure 7.2, below, gives us an idea of the number of asbestos cases that were pending in the federal courts by 1995.

The asbestos lawsuits were followed by lawsuits against the major tobacco companies and other manufacturers of defective products, such as silicone breast implants. The burden of handling the enormous volume of paper that quickly hit both the federal district and state trial courts was daunting. As noted above, the trial courts developed new *procedural plans* to deal with mass tort litigation. We will now consider the new *procedural* plans developed by the trial courts. These are: (1) case consolidation, (2) federal Multidistrict Litigation (MDL) plans and (3) class actions. We will study these procedures on the national level in the U.S. federal district courts. State trial courts often followed the federal procedural models to handle mass tort filings in their court systems.

(**Note:** The information provided about U.S. asbestos and other large mass tort lawsuits in this text is a simple overview and very general in its nature. Much more information is available in the legal literature about the cases themselves. Also, our studies do not include any discussion about the bankruptcy filings of the asbestos companies and the resulting legal implications. Our purpose in discussing these cases is only to appreciate the types of *procedural mechanisms* that the courts have used to handle the explosion of these product liability lawsuits.)

7.2.1 Case Consolidation

Court Rules govern all federal and state court proceedings. The court rules mandate the procedures to be used in handling lawsuits from their filing to their trial. One particular rule, Federal Rule of Civil Procedure [(Fed. R. Civ. P. 42(a)], allows a federal court to *consolidate* actions that *involve a common question of law or fact*. Frequently, the federal court rules are used as a model for state court rules, and as a result many states have court rules that are similar to the federal rules. Using this *consolidation rule*, both federal and state courts may create *special dockets* for the handling of mass tort lawsuits. In the case of mass tort litigation, this meant that a case alleging harm from a particular product was automatically assigned to a particular docket created to handle lawsuits related to the same defective products. In addition, a single judge was usually appointed to manage this docket.

Figure 7.1 A warning sign seen today on asbestos products

About Asbestos

The Product: Asbestos is a mineral used in insulation products, such as pipe covering, because of its ability to withstand high temperatures. When workers, such as pipe coverers and boiler makers, applied the insulation products, they would have to cut the insulation to fit the application using hand-held saws. This process produced large amounts of harmful asbestos dust, which the workers breathed. The workers were not warned about the hazards of the asbestos dust and did not wear breathing protection. Hundreds of thousands of workers were exposed to asbestos-containing products on their jobs in such places as steel mills, factories and ship yards. Workers suffering from the asbestos diseases began to sue the asbestos insulation product manufacturers beginning in the late 1960s. The product liability lawsuits were based on many theories, including negligent failure to warn of the hazards of the asbestos dust.

The Asbestos-Related Diseases: Workers exposed to asbestos dust developed three major lung conditions: (1) lung cancer (2) mesothelioma and (3) asbestosis.

Mesothelioma is a particular type of incurable lung cancer that attacks the lining of the lungs and is caused only by asbestos dust exposure. Sadly, mesothelioma is fast growing and the time between diagnosis and death is very short, generally one year or less. *Asbestosis* is a scarring of the lung tissue that causes great difficulty in breathing and can cause other health complications and death.

Consolidation: A Case in Point

A good example of a blueprint for consolidation was seen in the plan developed by the U.S. District Court for the Eastern District of Michigan beginning in the mid-1970s.[64] First, the court created a *special docket* for individual personal injury asbestos lawsuits. Any case filed in the federal court was automatically assigned to this court's *asbestos docket*. One federal judge was appointed to manage the docket. The federal judge appointed to manage the Eastern District of Michigan asbestos docket was the Hon. John Feikens. Judge Feikens was determined to move the asbestos cases as quickly as possible through the court so they did not clog the court's docket. To do so, he took advantage of Fed. R. Civ. P. 42 and **consolidated** the asbestos cases for trial.

Consolidation means that lawsuits are *grouped* or *bundled* and set to be tried together. Judge Feikens chose to bundle cases in groups of about 20 cases. The groups of cases were scheduled for trial on a tight discovery schedule of between nine and 12 months. (A **discovery period** is a specified period of time, after a case is filed and before trial begins, during which attorneys for plaintiffs and defendants exchange information about the lawsuits.) Because these were individual lawsuits, the injuries and damages claimed differed greatly in each case. Initially, Judge Feikens bundled lawsuits according to the date a case was filed, disregarding the odd result that the plaintiffs in the bundled cases were often represented by different law firms. As one trial expert observed about mixing plaintiff law firms at trial, "This is a most interesting and unique situation for plaintiffs' counsel." (The practice of grouping cases from different law firms was eventually abandoned by the court.)

Focusing on the fact that trial evidence would be the same or similar regarding how the plaintiffs were exposed to asbestos dust, as required by Fed. R. Civ. P. 42(a)(1), Judge Feikens allowed the lawsuits of plaintiffs with different injuries, ranging from serious cancers to less-serious lung disabilities, to be consolidated for trial before the same jury. Despite the different diseases suffered by the plaintiffs as a result of their exposure to asbestos, the judge concluded it was efficient to consolidate the cases for trial because of the similarity in the evidence to be presented about the plaintiffs' asbestos dust exposure. Judge Feikens repeatedly reminded counsel for both sides, who objected to the consolidation procedures for different reasons, that based on his judicial experience, "Juries are very smart and will be able to sort out the evidence" as it applied to the different plaintiffs. The case proceeded to trial against a single defendant, the Celotex Corporation, because the other 34 defendants settled with the plaintiffs before jury selection began. And, Judge Feikens changed his mind about which cases would be tried first against this remaining defendant. Despite the judge's initial plan to try all cases together before one jury, no matter the different types of asbestos-related diseases suffered by the plaintiffs, Judge Feikens ultimately selected the two cases in which the plaintiffs had died from the most serious diseases, lung cancer and mesothelioma. The Judge's announced plan to the attorneys for both sides was that the jury would determine the results in the most serious cases and this would most likely facilitate compromise and settlement of the cases for the remaining plaintiffs with lesser asbestos-caused diseases.

Judge Feiken's consolidation rules presented the attorneys with some unusual procedures for product liability lawsuits. For example, the two plaintiffs were represented by different law firms and Judge Feikens allowed the jurors to take notes during trial. Judge Feikens's observation about the jury's ability to follow the evidence and the proceedings proved true! The jury rendered a verdict in favor of each plaintiff. In the interest of completeness, you should know that the Sixth Circuit Court of Appeals overturned the verdict and remanded the case for a new trial. The cases that were tried then settled.[65] All the remaining cases in the trial group settled, too.

Judge Feikens continued his consolidation and other procedures for managing his court'sasbestos docket until 1991, when all asbestos cases around the country pending in the federal courts were transferred to one federal judge under what is called a *Multi-District Litigation* (MDL) order, which we will review below. Meanwhile, the state courts in Michigan and other states continued to follow case consolidation plans, similar to that of Judge Feikens, in their attempts to deal with the massive numbers of cases pending before these courts.

7.2.2 Multidistrict Litigation in the Federal Courts

Multidistrict Litigation (MDL) occurs when many cases involving common questions of fact have been filed in multiple federal district courts and are then consolidated in one court for more efficient processing. There is no one type of claim or legal theory that is suitable for MDL. Such cases might arise out of such diverse trial categories as plane crashes, train wrecks, hotel fires or toxic torts, such as asbestos. The need for MDL first became apparent in the 1960s after mass tort actions, such as those involving asbestos and other product liability claims, were being filed by the hundreds across the country. There was an obvious need to organize the handling of these cases for many reasons. A major reason was that the large volume of cases being filed were clogging the dockets of the federal courts and causing delays. The courts simply were not prepared to provide the necessary staff and resources to handle the huge, sudden influx of lawsuits. In response to this situation, in 1968 the U.S. Congress passed the MDL statute (28 U.S.C. § 1407), which created the **Judicial Panel on Multidistrict Litigation**. This panel, known as the **MDL Panel**, consists of seven sitting federal judges, who are appointed to serve on the panel by the Chief Justice of the U.S. Supreme Court, the highest court in the U.S. The panel has **two procedural-type jobs** stated in the statute: "(1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidative pretrial proceedings; and (2) select the judge or judges and the federal court where the MDL proceedings will take place." You can find detailed information about the history and proceedings of all MDLs, including the MDL for asbestos cases, at the official U.S. Government web site for the U.S. Judicial Panel on Multidistrict Litigation. www.jpml.uscourts.gov[66]

The Federal Court System *compared to* the State Courts in the U.S.: *A Brief Note*

We should note here that the law creating the MDL Panel has similar features to the federal court rules for *consolidation,* which we just studied above. The idea behind both the consolidation rules and the MDL panel is to address the issue of how the courts can manage a huge number of case filings in an expeditious and equitable manner for all parties, as well as the courts. The best forum for resolution of massive numbers of product liability lawsuits is probably the unified *federal court system*, rather than the individual *state court systems*, for several reasons. The *federal courts* are part of a national court system overseen by the U. S. Supreme Court, the highest court in the United States. Every federal court follows the same court rules. Thus, the lawyers and the parties involved in the lawsuits work with only one set of court rules regardless of where the federal courthouse is located. In addition, the federal courts were created, in part, to hear lawsuits between citizens of different states to ensure fairness to non-local parties. For lawsuit purposes, a business or corporation is treated as an individual citizen, which means that a corporate product manufacturer can be a plaintiff or a defendant in a lawsuit just as an individual person can be. In contrast to the federal courts, **state courts** were created to handle lawsuits primarily between citizens of the same state. Each state court maintains its own independence in terms of organization and management under its respective state supreme court. There is no realistic procedural mechanism for courts within a given state to manage the mass tort injury lawsuits filed within the state's respective courts. Each county court, within a given state, handles the volume of cases filed before it as the court sees fit. By contrast, the federal court system presented an ideal opportunity for a more unified system of case management. The national composition of the federal courts allowed for the formation of MDL dockets for many product liability lawsuits, including the massive asbestos lawsuit filings. The asbestos case MDL plan was developed to handle all of the cases that still remained before the federal courts 30 years after the first lawsuits were filed. The MDL for asbestos cases is a good case study of the handling of massive numbers of product liability lawsuits by the federal court.

The MDL for Asbestos Product Liability Litigation

Asbestos lawsuits were filed across the U.S. in vast numbers though the 1980s and 1990s and are still filed today. To manage the numerous asbestos case filings, an MDL docket was created on July 29, 1991, for the federal courts. It was called "MDL-875 for Asbestos Product Liability Litigation" and is still in existence today. The creation of this panel meant that all asbestos personal injury lawsuits around the country were transferred to the U.S. District Court for the Eastern District of Pennsylvania. The purpose of the asbestos MDL docket (and of all MDL dockets) is to "centralize the cases to avoid duplication of discovery, to prevent inconsistent pretrial rulings and to conserve the resources of the parties their counsel and the judiciary." If a case is not resolved within the MDL 875 docket, the cases are returned to the original federal court where they were filed and set for trial. With mass numbers of cases before the federal courts, we can see that an MDL order can be an effective procedural tool that allows the parties to have their day in court in a fairly timely manner. (**Note:** Since the filing of the first asbestos lawsuit, most of the major asbestos manufacturers have filed for protection under the federal bankruptcy laws. As part of their bankruptcy plans, many of the bankrupt companies established payment funds for victims of asbestos disease. The MDL Panel also manages these funds.)

To provide us with a perspective of how massive the case filings are in a *mass tort* situation, the following chart shows the number of asbestos cases ordered to be handled by the MDL-875. We should remember that these numbers are only for the federal courts and do not include the cases filed in individual U.S. state courts.

ASBESTOS CASE TOTALS – MDL -875

(Totals are as of August 31, 2011)

Cases Transferred in July 1991 to MDL	Cases Resolved by 8/31/2011 in MDL	Cases Pending on 8/31/2011 in MDL
168,932	156, 588	12,344

Figure 7.2: *Source:* U.S. Judicial Panel on Multidistrict Litigation[67]

The MDL for GM Ignition Switch Property Damage Litigation

Figure 7.3 The GM Ignition switch involved in MDL-2543 *Source- USA Today*

The federal MDL process continues to be used for mass case filings. In June 2014, the federal courts across the country again used the MDL mechanism to handle the growing number of lawsuits filed against General Motors (GM) as a result of alleged faulty ignition switches in GM cars, including the Chevrolet Cobalt and the Saturn Ion. These cases involved property damage, not individual personal injuries, and were filed against GM in many federal courts around the country. Many of these lawsuits were certified as *class action lawsuits*, which we will study below. The attorneys for the plaintiffs and defendants petitioned the MDL Judicial Panel asking that the ignition switch property damage docket be centralized in one U.S. District Court forall pretrial matters. The parties realized that such organization would be helpful for both sides of the cases. The Judicial Panel granted the requests and created MDL No. 2543 entitled, "IN RE: GENERAL MOTORS LLC IGNITION SWITCH LITIGATION." (As of December 2014, this MDL consisted of approximately 89 class action lawsuits that were pending in 31 different federal district courts across the U.S. The cases were transferred to the U.S. District Court for the Southern District of New York. (You could turn back to Chapter Three (and **Figure 3.5**) and review the *Ponce* case, one of the faulty ignition class action lawsuits against GM, which was filed in federal court in California. This case has now been transferred to the Southern District of New York as part of the MDL for pretrial procedures. As in all cases transferred to an MDL docket, if a case does not settle, the case is returned to the original federal court for trial after the pretrial proceedings are complete. It is interesting to note that the GM Ignition Switch MDL consolidated many *class actions* from around the country. We will now turn to a lawsuit procedure called *class action* to see how this procedure manages many lawsuits at once, including many product liability lawsuits. For info on the pending MDL's www.jpml.uscourts.gov/panel-order[68]

7.2.3 Class Action Lawsuits

The *class action* lawsuit is a third procedural mechanism used to manage the mass filing of lawsuits, including those in product liability. Earlier in this chapter, we saw how individual product liability lawsuits could be *consolidated* for trial. A **class action lawsuit** is another grouping process for cases. Class action lawsuits typically involve claims for *property damages* and not claims for damages as a result personal injury resulting from a defective product. The reason that the *class actio*n is used for property damage product liability lawsuits is that the cases involve identical claims by plaintiffs for economic loss against the same manufacturer for the same product defect. In contrast, a personal injury lawsuit seeks damages for injuries that are specific to the individual plaintiff as a result of a product defect. For example, remember our earlier discussion about asbestos personal injury lawsuits that were consolidated by Judge Feikens. These lawsuits were individual cases filed by each plaintiff because each plaintiff had different medical injuries from asbestos dust exposure. The attorneys for the injured plaintiffs in the asbestos cases could not file one lawsuit on behalf of a *class or a group of plaintiffs* because each case was different. Instead, individual cases were grouped or *consolidated* for trial so that the individual medical evidence from each plaintiff would be heard by the jury. In contrast, other evidence, such as how the plaintiffs worked around asbestos dust at the same factory, was often the same for all plaintiffs. Let us now see how a *class action* lawsuit differs from the case *consolidation* process.

There are both federal and state court rules that outline the process for filing and handling class actions. Although the class action is not a new procedure, it has found a new application within mass tort litigation during the last 30 years in the U.S. Because many states base their court procedural rules on the federal rules, we will again rely on the federal (national) system for our study here. Federal Rule of Civil Procedure 23 (Fed. R. Civ. P. 23) governs the process for filing a **class action lawsuit**.[69] The *first step* is to *create the class* of plaintiffs that will proceed with the lawsuit. This means that the court is asked to create or *certify* a group (*the class*) of individuals to represent all those individuals (*the parties*) who are *similarly situated.* Although the court rules allows *either* party, meaning the plaintiff or the defendant, to request the creation of the representative class, usually it is the lawyer for the plaintiffs who asks the court to order a group of plaintiffs to be certified as representatives of a much larger class of plaintiffs. This is what happened in the *Ponce* case against GM. All plaintiffs seek identical damages in a class action lawsuit. In *Ponce*, the plaintiffs were primarily seeking reimbursement for the purchase price of the car they were afraid to drive because the car contained a defective ignition switch. The court will allow plaintiffs to proceed as a class if the following **requirements of Rule 23 are met**:

1) **The class is so numerous that joinder of every single member is impracticable;**
2) **There are questions of law or fact common to all members of the class;**
3) **The claims or defenses of the representative class members are typical of the claims of the class; and**
4) **The representative plaintiffs will fairly represent all members of the class.**

Once the class is formed, a single set of pretrial and trial procedures are used for all the claims, an efficient procedure for the handling of claims from hundreds of individuals.

The class action in the *Ponce* case involved a very serious matter. In contrast, we sometimes encounter cases that some legal experts would describe as humorous at best and frivolous at worst. One such case is a lawsuit against a franchised sandwich shop called *Jimmy John's.* In this case, consumers sued because their sandwiches did not contain the advertised alfalfa sprouts! The lawsuit was filed in the state Superior Court in Los Angeles, and it is interesting that it was certified conditionally *as a class action for settlement purposes only*. Although a state case, the lawsuit did meet the requirements of Federal Rule 23 because California's state court rules of civil procedure track the federal rules. *Class certification for settlement purposes only* is an unusual use of the class action procedure and another example of how U.S. courts manage massive filings of tort lawsuits.

As a student, you should consider *the pros and cons* of filing a lawsuit such as the *Jimmy John's case, discussed* below.

Figure 7.4 A sandwich with sprouts

***Heather Starks v. Jimmy John's, LLC, et. al.* (Case No. BC501113) in the Superior Court, Los Angeles County**[70]

The Lawsuit

In her complaint, Plaintiff Heather Starks alleges, among other things, that by failing to supply alfalfa sprouts on its sandwiches, the defendant committed fraud and violated California's False Advertising and Consumers Legal Remedies Acts. Pages of the complaint are dedicated to extolling the virtues of alfalfa sprouts.

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6029 9/1387

FILED
Los Angeles Superior Court

FEB 14 2013

John A. Clarke, Executive Officer/Clerk
By _____, Deputy
SHAUNYA WESLEY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

HEATHER STARKS, individually, and on behalf of other members of the general public similarly situated,

Plaintiffs,

vs.

JIMMY JOHN'S LLC, a Delaware limited liability company; JIMMY JOHN'S FRANCHISE, LLC, a Delaware limited liability company; and DOES 1 through 100, inclusive,

Defendants.

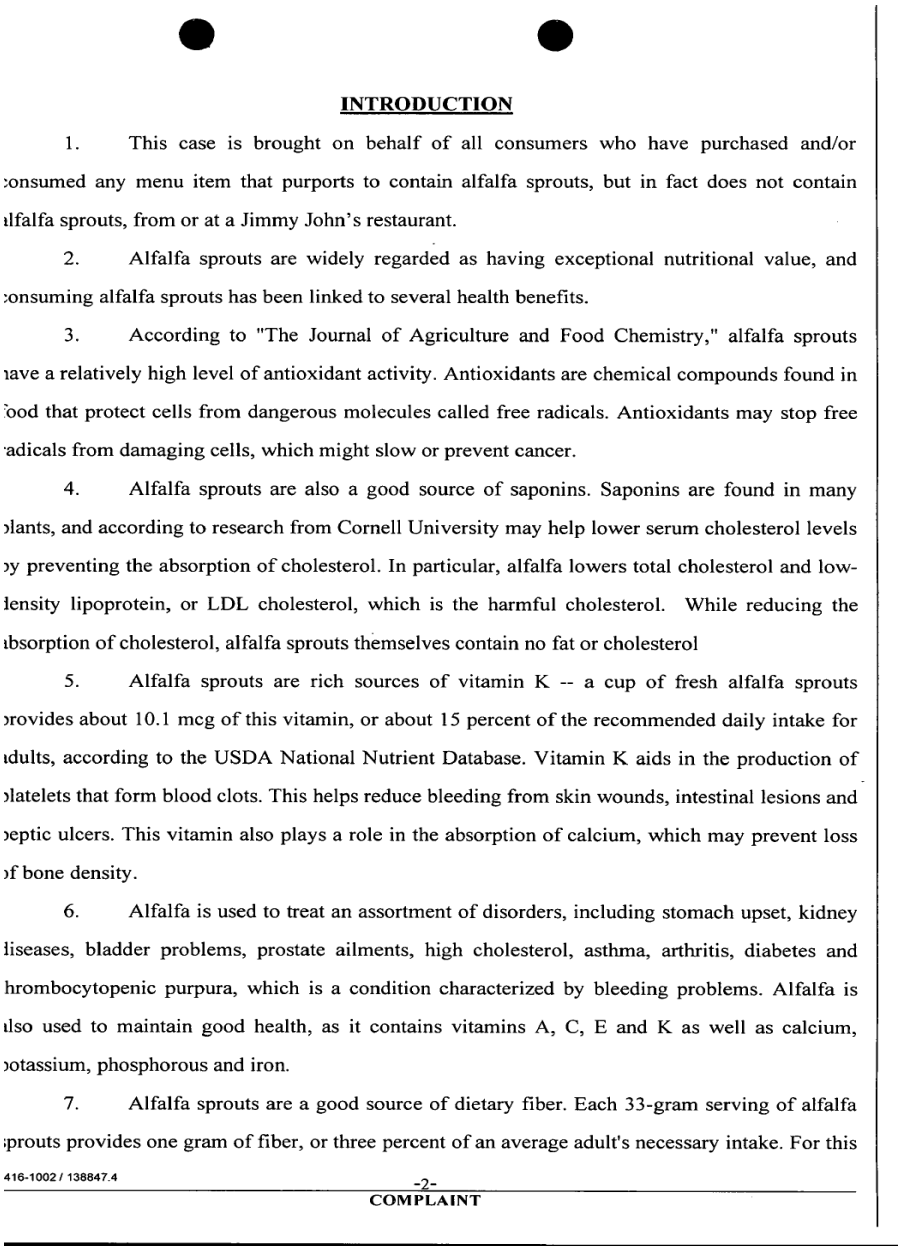
Case No. BC501113

CLASS ACTION COMPLAINT FOR

(1) Intentional Misrepresentation
(2) Negligent Misrepresentation
(3) Fraud
(4) Violation of California's False Advertising Act, California Bus. & Prof. Code sections 17500, et seq.
(5) Violation of California's Unfair Business Practices Act, California Bus. & Prof. Code sections 17200, et seq.
(6) Violation of California's Consumers Legal Remedies Act, Civil Code sections 1750, et seq.
(7) Intentional Interference With Contract

CITY/CASE: BC501113
LEA/DEPT:
RECEIPT: CH4459800071
DATE PAID: 02/14/13 12:33 PM
PAYMENT: $435.00
RECEIVED
CHECK: $0.00
CASH: $0.00
CHANGE: $0.00
GRAND: $435.00

COMES NOW, Plaintiff HEATHER STARKS ("Plaintiff"), individually, and on behalf of all other members of the general public similarly situated, and alleges, based on information and belief, as follows:



INTRODUCTION

1. This case is brought on behalf of all consumers who have purchased and/or consumed any menu item that purports to contain alfalfa sprouts, but in fact does not contain alfalfa sprouts, from or at a Jimmy John's restaurant.

2. Alfalfa sprouts are widely regarded as having exceptional nutritional value, and consuming alfalfa sprouts has been linked to several health benefits.

3. According to "The Journal of Agriculture and Food Chemistry," alfalfa sprouts have a relatively high level of antioxidant activity. Antioxidants are chemical compounds found in food that protect cells from dangerous molecules called free radicals. Antioxidants may stop free radicals from damaging cells, which might slow or prevent cancer.

4. Alfalfa sprouts are also a good source of saponins. Saponins are found in many plants, and according to research from Cornell University may help lower serum cholesterol levels by preventing the absorption of cholesterol. In particular, alfalfa lowers total cholesterol and low-density lipoprotein, or LDL cholesterol, which is the harmful cholesterol. While reducing the absorption of cholesterol, alfalfa sprouts themselves contain no fat or cholesterol

5. Alfalfa sprouts are rich sources of vitamin K -- a cup of fresh alfalfa sprouts provides about 10.1 mcg of this vitamin, or about 15 percent of the recommended daily intake for adults, according to the USDA National Nutrient Database. Vitamin K aids in the production of platelets that form blood clots. This helps reduce bleeding from skin wounds, intestinal lesions and peptic ulcers. This vitamin also plays a role in the absorption of calcium, which may prevent loss of bone density.

6. Alfalfa is used to treat an assortment of disorders, including stomach upset, kidney diseases, bladder problems, prostate ailments, high cholesterol, asthma, arthritis, diabetes and thrombocytopenic purpura, which is a condition characterized by bleeding problems. Alfalfa is also used to maintain good health, as it contains vitamins A, C, E and K as well as calcium, potassium, phosphorous and iron.

7. Alfalfa sprouts are a good source of dietary fiber. Each 33-gram serving of alfalfa sprouts provides one gram of fiber, or three percent of an average adult's necessary intake. For this

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-2-

COMPLAINT

Figure 7.5 The first two pages of the complaint filed in *the Starks* lawsuit

The Proposed Class Action Lawsuit Settlement in the *Starks* case

As we noted, the *Starks* lawsuit was certified as a class action in an attempt to settle it. Settlement was achieved between the parties after a day-long mediation hearing on November 8, 2013.

(**Mediation** is an out-of-court procedure encouraged and sanctioned by all U.S. Courts. For mediation, a neutral person is selected as the mediator and works with both sides of the lawsuit in a business meeting setting, in an attempt to reach a settlement. Mediation is encouraged by the courts because, if the matter can be settled, the court saves time and the parties can avoid the delays and costs associated with a trial.)

After a settlement in a class action lawsuit, the court must give notice to anyone who was a plaintiff and to anyone who could be a plaintiff. Once notice is given, plaintiffs can decide to accept the settlement *(opt-in)* or to decline the settlement and proceed on their own *(opt-out)*. *The Notice of Proposed Class Action Settlement*[71] issued by the court in the Starks case, described those entitled to participate in the settlement (***the class***) as follows:

> **All United States-based consumers who were exposed to Defendants' menus, and who purchased, from Jimmy John's restaurant in the United States, a sandwich identified on a Jimmy John's menu as containing alfalfa sprouts but which in fact did not contain alfalfa sprouts, where such purchase occurred between February 1, 2012 and July 21, 2014.**

This notice was distributed through the defendant's website[72] and through printed notices distributed in Jimmy John's restaurants around the country. Here are the terms of the settlement contained in the notice:

> **Without admitting liability, Defendant has agreed to provide vouchers to any Jimmy John's restaurants with a face value of $1.40 and good for any side item (pickle, chips or cookie) or soda, to all participating claimants who timely complete the online claim form…up to a maximum of $725,000.00 less settlement administration cost. ($15,000.00 is expected to be paid to the Settlement Administrator.)**

In addition, Jimmy John's agreed to donate at least $100,000 to charity. The settlement provided for Plaintiff Starks to receive $5,000 if the settlement is approved by the court. Fees and costs for the class attorneys were capped at $370,000. It is lawsuits like this one that spark debate about *Tort Reform*, which we will now consider.

7.3 Tort Reform

Recall that in Chapter One we read how one eminent U.S. legal scholar, Geoffrey C. Hazard Jr., noted that the subject of product liability has become "political in that it involves issues of distributive justice and has attracted the attention of vocal and aggressive partisans in legislative forums and election campaigns." Hazard, Geoffrey C., Jr., Forward, American Law Institute, *Restatement of Law Third*.[73]

Tort Reform is the term given to proposed legal and legislative changes to the rules governing civil lawsuits in tort, including product liability, as described by Hazard. The two main parties to the debate are: (1) on one side, product manufacturers and their insurance companies claiming that too many frivolous product liability lawsuits are filed, and jury verdicts in some cases are unfairly exorbitant, and (2) on the other side, the very large number of plaintiff-victims injured by defective products, who are fearful that the manufacturers will seek bankruptcy protection before they can be fairly compensated. Trial attorneys and legal scholars alike have observed that the data to support either side of this debate is inconclusive and controversial in its own right. In response to the perception that liability insurance coverage was becoming more costly and less available, most state legislatures, beginning in the mid-1980s, engaged in tort reform that changed the common law and court procedures regarding tort litigation, including the product liability area. Despite these changes, tort reform remains controversial.[74]

Since 1986, at least 18 states have passed laws limiting non-economic damages. (Recall from our previous discussion on damages that "non-economic damages" are also known as damages for "pain and suffering.") These states include: Michigan, Florida and Maryland. As an example, in 1995 Michigan law was changed to cap non-economic damages in product liability lawsuits. MCL 600.2946(a)(1) now states:

> **In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital body function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00.**

At least one study of state-level tort reforms supported the finding that these non-economic damage caps "led to increased profitability for insurers and a decrease in premiums." Summary Table 2 page X report of Congressional Budge Office report.[75] But, the debate continues.

A good example of the *politicization* of tort reform, on a national level, was seen in the 1994 national mid-term elections for U.S. Congress. The Republican Party, as part of its election platform, wrote what the party called its *Contract with America.*[76] This contract was a short 10-point document endorsed and signed by 300 Republican candidates and became the talking points for the campaign trail. Democrats disagreed with the contract, and debate was lively. Of note is that Point No. 9 in this Contract was called *The Common Sense Legal Reform Act*, which called for: "'Loser pays' laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation." After the election, *The Product Liability Fairness Act of 1995*[77] was introduced and passed both houses of Congress. However, the law was vetoed by President Bill Clinton, a Democrat.

7.4 Summary

In this chapter you learned about mass tort litigation in U.S product liability lawsuits.

You learned about Multidistrict litigation (MDL) and how courts apply special rules to allow the consistent handling of thousands of product liability lawsuits that have been filed around the country. You learned what is meant by a class action lawsuit, and how this procedure provides some relief to the courts from the volume of economic damage lawsuits filed by many plaintiffs against the same product manufacturer. You also learned about the concept of tort reform and how the filing of mass product liability lawsuits has led to substantial changes in to the common law in both the state and federal courts.

7.5 Key Terms

Class action lawsuit

Consolidation

Mass tort litigation

Multidistrict litigation

National safety statutes

Property damage product liability lawsuits

Personal injury product liability lawsuits

Tort reform

7.6 Chapter Discussion Questions

1. What is meant by the term mass tort litigation?
2. What is meant by a class action lawsuit?
3. Give an example of a class action lawsuit.
4. What is meant by the term tort reform?
5. Give one example of a state that engaged in tort reform and what that state did?
6. What is the purpose of national safety statutes such as the Motor Vehicle Safety Act?
7. What are some pros and cons of filing a case like the *Heather Starks v. Jimmy John's, LLC* lawsuit?
8. What is meant by the term consolidation?
9. Give an example from your studies of lawsuits that were consolidated.
10. What is meant by the term multidistrict litigation?

7.7 Test Your Learning

1. If many persons wish to file a lawsuit against a single product manufacturer for property damages as a result of a defect in the product, what procedural category of a lawsuit is filed?
   a) A class action lawsuit
   b) A multidistrict litigation lawsuit
   c) A personal injury lawsuit
   d) A consolidated lawsuit

2. What does the acronym *MDL* stand for?
   a) Multiple disciplinary lawsuits
   b) Many defendants liable
   c) Most defendants liable
   d) Multidistrict litigation

3. In the case study in this chapter, U.S. District Judge Feikens used what procedural tool to move asbestos cases on the court's docket?
   a) Consolidation
   b) A class action
   c) An MDL procedure
   d) None of the above

4. Who forms an MDL case docket?
   a) The plaintiff files a motion to form the docket
   b) The defendants file motions to form the docket
   c) The Judicial Panel on Multidistrict Litigation forms the docket
   d) The federal court petitions for the docket

5. Which of the following federal court rules applies to class action lawsuits?
   a) Federal Rule 13
   b) Federal Rule 23
   c) Federal Rule 6 (A)
   d) Federal Rule 92

6. Which of the following correctly states the four (4) necessary elements for a group of plaintiffs to be certified as a *class* for a class action lawsuit under the federal rules?
   a) The courthouse is too small, there are too many potential plaintiffs, the representative plaintiffs will fairly represent all members of the class
   b) The class is so numerous that joinder of every single member is impracticable, there are questions of law or fact common to all members of the class, the claims or defenses of the representative class members are typical of the claims of the class, the representative plaintiffs will fairly represent all members of the class
   c) There are too many potential defendants, the courthouse is too small, the parties live around the country, there are common issues of law or fact
   d) The courthouse is too small, the class is so numerous that joinder of every single member is impracticable, there are questions of law or fact common to all members of the class, the claims or defenses of the representative class members are typical of the claims of the class

7. What part of GM's Chevrolet Cobalt and the Saturn Ion cars was alleged to be defective?
   a) The steering wheel
   b) The wheels
   c) The windshield
   d) The ignition switch

8. Which of the following is an example of tort reform of a state law governing product liability?
   a) Caps on noneconomic damages
   b) Caps on medical costs
   c) The limiting of the statute of limitations
   d) Limits on death benefits

9. What is meant by the term *tort reform*?
   a) A debate about who should be the next U.S. president
   b) Proposed legal and legislative changes to the laws governing product liability
   c) A political party
   d) Changing the procedures for appointing judges to hear lawsuits

10. Which of the following is *not* a procedural mechanism for the handling of mass tort litigation?
    a) Multidistrict litigation
    b) Class actions
    c) Case consolidation
    d) Case dismissals
    e) None of the above

Test Your Learning Answers are located in Appendix A.

8 Appendix A

8.1 Test Your Learning

Chapter 1: US Product Liability Law

1. B
2. E
3. A
4. B
5. C
6. A
7. B
8. B
9. B
10. C

Chapter 2: Legal Theories of Recovery: Negligence

1. C
2. B
3. C
4. B
5. D
6. D
7. A
8. C
9. C
10. C

Chapter 3: Legal Theories of Recovery: Breach of Warranties

1. B
2. D
3. A
4. C
5. C
6. B
7. D
8. C
9. A
10. B

Chapter 4: Legal Theories of Recovery: Strict Liability

1. C
2. A
3. D
4. C
5. B
6. B
7. C
8. D
9. C
10. D

Chapter 5: Legal Theories of Recovery: Misrepresentation

1. A
2. B
3. A
4. A
5. C
6. C
7. B
8. D
9. A
10. A

Chapter 6: Defenses to Product Liability Lawsuits

1. C
2. C
3. C
4. A
5. B
6. B
7. C
8. A
9. D
10. A

Chapter 7: US Product Liability Today

1. A
2. D
3. A
4. C
5. B
6. B
7. D
8. A
9. B
10. D

9 Endnotes

1. *Black's Law Dictionary* at 1401 (10th ed. 2014)
2. Max Radin, *The Trail of the Calf,* 32 Cornell L. Quarterly 137 (1946)
3. MacPherson v. Buick Motor Co., 217 N.Y. 382, 11 N.E.1050 (1916). Quotations in the text are from the New York State Reporter, 217 N.Y. 382. The full text of the case is available at: http://www.courts.state.ny.us/reporter/archives/macpherson_buick.htm.
4. *Id.*
5. *Id.* at 385
6. *Id.* at 389
7. *Id.*
8. *Mich. Comp. Laws Ann.* § 600.2845(i) (West)
9. *MacPherson,* 217 N.Y. at 388
10. Restatement (Second) of Torts §402A (1965) Restatement (Third) of Torts, Products Liability (1998)
11. Restatement (Third) of Torts: Products Liability, Foreward at xvi (1998)
12. e.g.: George W. Cook, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?,* 100 Yale L.J. (March 2000). This law review article provides an example of the scholarly debate concerning the definitios contained in the latest Restatement (Third) of Torts, Products Liability
13. David G. Owen, *Products Liability Law Hornbook,* at 29, (5th ed. 2005)
14. *Black's Law Dictionary* at 1196 (10th ed. 2014)
15. Grimshaw v. Ford Motor Co., 119 Cal. App. 3rd 757, 174 Cal. Rptr. 348 (1981). The full text of this case is available at http://ww.courts.ca.gov/opinions-slip.htm
16. Dan B. Dobbs, *The Law of Torts*, at 63–64 (The West Group 2001)
17. *Id.* at 67
18. U.S. v. Carroll Towing, Inc., 159 F. 2d 169 (2nd Cir. 1949). The full text of this case is available at: http://law.justia.com/cases/federal/appellate-courts
19. *Id.* at 174
20. *Id.,* endnote 18
21. *Id.,* endnote 19
22. *Id.* at 173–174
23. *Id.* at 174
24. *Id.*, at 173
25. *Id.,* endnote 15
26. *Grimshaw,* 119 Cal. App. 3d at 777,791
27. *Id.,* endnote 15
28. *Grimshaw,* 119 Cal. App. 3d at 774
29. *Id.,* at 774
30. *Palsgraf v. Long Island Rail Co.,* 162 N.E. 99 (N.Y. 1928)
31. *Id.*
32. *Grimshaw,* 119 Cal. App. 3d at 772–773

33. Owen, *supra,* at 480
34. Owen, *supra,* at 74
35. Restatement (Third) of Torts: Products Liability § 2 comment (d) (1998)
36. Owen, *supra,* at 73
37. Owen, *supra,* at 564
38. Owen, *supra,* at 566–567
39. 15 U.S.C. § 2301 (Magnuson Moss) is accessible at: http://www.law.cornell.edu/uscode/text The UCC is accessible at: http://www.law.cornell.edu/ucc
40. *Black's Law Dictionary* at 1821 (10th ed. 2014)
41. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (Wash. 1932). Quotations in the text are from the New York State Reporter, 217 N.Y. 382. The full text of the case is available at: http://courts.mrsc.org/washreports/index_dtSearch.html
42. *Henningsen v. Bloomfield Motors, Inc. and Chrysler Corp.,* 32 N.J. 358,161 A. 2d 69 (1960). The full text of this case can be found at: http://www.freecasebriefs.com/henningsen-v-bloomfield-motorsinc- 1960
43. *Id.* Quotations in the text are from the New Jersey State Reporter, 32 N.J. 358
44. M. Stuart Madden, *Strict Products Liability Under the Restatement,(Second) of Torts* § 402A: *"Don't Throw the Baby out with the Bathwater,"* 10 Toronto L. Rev. 130 (1993–1994)
45. Restatement (Second) of Torts § 402A
46. Owen, *supra,* at 261–266

47. *Greenman v. Yuba Power Products,* 377 P. 2d 897, 59 Ca. 2d 57 (1963). Quotations in the text are from the California Supreme Court Reporter, 59 Cal. 2d 57. The full text of this case is available at: www.courts.ca.gov/opinions-slip.htm
48. e.g.: *Westic Battery Co. v. Standard Electric Co.,* 482 F. 2d 1307, 1315 (10thCir. 1973). This case is accessible at: http://law.justia.com/cases/federal/appellate-courts
49. *Id.,* endnote 47
50. Owen, *supra,* at 23–48
51. *Havener v. Richardson,* 16 F. Supp 2d 774 (E.D. Mich. 2998), reversed on other grounds, 198 F. 3d 245 (6th Cir. 1999). This case is accessible at: http://law.justia.com/cases/federal/districtcourts/FSupp2/16/774/2460548/
52. *Oppenhuizen v. Wennersten,* 139 N.W. 2d 765 (1996)
53. Restatement (Second) of Torts § 552
54. *Germain v. Teva Pharmaceuticals, USA, Inc.,* 758 F. 3d 917 (6th Cir. 2014). This case is accessible at: http://law.justia.com/cases/federal/appellate-courts
55. *Id.,* endnote 51
56. Owen, *supra,* at 816
57. Patton v. TIC United Corp., 77 F.3d 1235 (10th Cir. 1996). This case is accessible at: http://law.justia.com/cases/federal/appellate-courts
58. *Id.*
59. *e.g.: A C & S, Inc. v. Asner,* 344 Md. 155, 686 A. 2d 250,254 (1996)
60. Owen, *supra,* at 679
61. Patrick R. Buckler, *State of the Art Evidence in Product Liability Lawsuits in Maryland,* 28 U. Balt. L. Rev. 117, 121–122 (Fall 1998)
62. 49 U.S.C § 301 is accessible at: the U.S. Government website, www.nhtsa.gov. 21 U.S.C.§ 301 is accessible at: www.fda.gov. and 15 U.S.C. §2015 can be found at: www.cpsa
63. A perspective on the number of asbestos cases, pending in the federal courts alone, can be obtained from the website: www.jpml.uscourts.gov
64. The history of the consolidation of the asbestos docket in the U.S. District Court for the E.D. of Michigan, before the Hon. Judge John Feikens, is based on the author's participation as a trial attorney in cases on this docket
65. *Laney v. Celotex Corp.,* 901 F. 2d 1319 (6th Cir. 1990). This case is accessible at: http://law.justia.com/cases/federal/appellate-courts
66. Information about U.S.MDL proceedings can be accessed at the website for multi-district litigation at: www.jpml.uscourts.gov.
67. www.jpml.uscourts.gov
68. *Id.*
69. See: Federal Rules of Civil Procedure: http://www.law.cornell.edu/rules/frcp
70. Documents in this case are accessible at: www.lacourt.org. under the Case No. BC501113 or under the name of the case
71. *Id.*

72. www.jimmyjohns.com
73. *Id.,* endnote 11
74. Douglas Holtz-Eakin, Director, Preface,to: A CBO Paper, *The Effects of Tort Reform: Evidence from the States,* June 2004, published by the Congress of the United States – Congressional Budget Office. This Report can be accessed at: http://www.cbo.gov/publication/15731.
75. *Id.* at x.
76. The Contract with American can be accessed at: http://www.nationalcenter.org/Contractwith America.html
77. The history of the Product Liability Fairness Act of 1995 in the 104th Congress can be found at: https://www.govtrack.us/congress/bills/104/hr956